

# Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court

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# Confidentiality, Privilege and Rule 408: The Protection of Mediation Proceedings in Federal Court

Charles W. Ehrhardt\*

## I. INTRODUCTION

The intersection of two separate areas of law is considered in this paper, in light of two critical recent developments, one in Congress and the other in the recent decisions involving investigations by the Office of Independent Counsel. Congress has just passed the Alternative Dispute Resolution Act of 1998 which requires each United States District Court to authorize by local rule the use of alternative dispute resolution (ADR) processes in civil actions and requires each district to "encourage and promote the use" of ADR.<sup>1</sup>

The Supreme Court and the courts of appeals have considered and defined the scope of the confidentiality and evidentiary privileges which are recognized in the federal courts in a series of cases arising out of actions of the Office of Independent Counsel. Congress has recognized the importance of confidentiality in mediation and the other types of ADR.<sup>2</sup> But whether a mediation privilege will be adopted in the federal courts in light of the framework used to determine whether to recognize new claims of evidentiary privileges set forth in the Independent Counsel and other recent decisions is either unexplored or much disputed. Clarifying this critical intersection is the focus of this paper.

At the same time state legislatures and the drafters of the new Uniform Mediation Act are crafting provisions to define the protections afforded to confidentiality,<sup>3</sup> there is little guidance for the federal courts even though it is likely that mediation and other types of ADR will become more widely

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1. Pub. L. No. 105-315, 112 Stat. 2933 (1998). See Elizabeth Plapinger & Donna Stienstra, ADR and Settlement in the Federal District Courts 3-4 (1996) (summary of the use of ADR in federal courts prior to 1996).

2. ADR Act, § 2, 112 Stat. at 2933. See *infra* authorities cited in note 17, discussing the importance of protecting the confidentiality of mediation. See also R. Fisher et al., Getting to Yes 32-36 (2d ed. 1991).

3. See Richard C. Rueben & Nancy H. Rogers, *Choppy Waters*, Dispute Resolution Magazine 4 (Winter 1998).

used.<sup>4</sup> Since mediation is the most frequently used method of ADR in the federal courts,<sup>5</sup> this paper examines the types of protection that are, or should be, afforded confidential communications in the context of mediation. Although mediators usually tell the parties that the proceedings are confidential, the mediators promise does not create an evidentiary privilege or other protection that will be judicially recognized.<sup>6</sup>

The significance of the 1998 Act is discussed in Part II of this paper. Part III examines local rules and standing orders of the United States District Courts which were enacted prior to the 1998 Act and provide for the confidentiality, inadmissibility, or privilege of mediation proceedings conducted in that district's court-based mediation or ADR program. The local rules adopt at least three approaches. The first type of rule states mediation proceedings are confidential but does not provide protection against extra-judicial disclosure through discovery or other judicial process. Another approach treats mediation proceedings as other settlement negotiations which are subject to the evidentiary rule of exclusion when the evidence of a failed mediation is offered at trial. The final type of protection found in the local rules recognizes a privilege for mediation proceedings which protects against both discovery and admissibility at trial.

Since evidence of mediations conducted outside of a district's court-based program are not protected by most local rules, Part IV examines the "broad protection" extended to mediation proceedings by Rule 408 of the Federal Rules of Evidence, the exclusionary evidentiary rule relating to offers of settlement and compromise. The applicability of the rule to exclude evidence of statements made during mediation proceedings as well as the limitations of Rule 408 are analyzed. Finally, Part V explores whether a mediation privilege will be recognized under Federal Rule of Evidence 501, which provides that in federal courts evidentiary privileges will be recognized under the "principles of the common law as interpreted in light of

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4. In circuits where there are appellate mediation programs, rules have been adopted protecting the confidentiality of mediation. See 6th Cir. Bankr. App. Panel R. 8080-2(d) ("Statements made and information exchanged during a pre-argument conference or mediation are confidential. . . ."); 3d Cir. Order Establishing Appellate Mediation Program App. VI ("The mediator shall not disclose the substance of mediation session(s), nor report on the same, to any person or persons. The attorneys are likewise prohibited from disclosing any substantive information . . .").

5. See Plapinger & Stienstra, *supra* note 1, at 4.

6. "[T]he mere fact that a [client] communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege. . . . No pledge of privacy nor oath of secrecy can avail against demand for the truth in a court of justice." *Branzburg v. Hayes*, 408 U.S. 665, 682 n.21, 92 S. Ct. 2646, 2657 n.21 (1972) (quoting 8 John H. Wigmore, *Evidence* § 2286, at 543 (McNaughton rev. 1961)). See *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 923 (8th. Cir. 1997) (Rejecting the argument that "Mrs. Clinton's reasonable belief that her conversations with White House lawyers were privileged is sufficient to prevent their disclosure.").

reason and experience." The paper discusses recent attorney-client privilege decisions arising out of investigations by the Office of Independent Counsel as well as the Court's decision in *Jaffee v. Redmond*<sup>7</sup> which provide a frame work for analyzing whether a new common law mediation privilege will be recognized.<sup>8</sup> This section argues that a "common law" mediation privilege will not be recognized under Federal Rule 501 until empirical data is developed which supports the public and private interests which are served by the recognition of a "common law privilege," and there is a clearer consensus among the federal district courts and the states that a mediation privilege is necessary and desirable.

## II. 1998 ACT

Federal courts have experimented with ADR since the 1970s. Congress also has encouraged the expansion of court-based ADR. First, it authorized ten district courts to require the parties to participate in arbitration and an additional ten districts to offer voluntary arbitration.<sup>9</sup> Subsequently, it adopted the Civil Justice Reform Act (CJRA)<sup>10</sup> which required each district to implement a civil justice and delay reduction plan and recommended ADR as one of six civil case management principles.<sup>11</sup>

The 1998 ADR Act requires each district court to authorize by local rule the use of ADR in civil actions. Congress specifically found that ADR may provide greater satisfaction to the parties, greater efficiency in achieving settlements and more innovative methods of resolving disputes. The Act also recognizes that implementation of ADR in the federal courts has the potential of reducing the large backlog of pending cases and "allowing the courts to process their remaining cases more efficiently."<sup>12</sup>

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7. 518 U.S. 1, 116 S. Ct. 1923 (1996).

8. Although there are a number of ethical issues which surround the mediator and the lawyers participating in the mediation, they are beyond the scope of this paper.

9. 28 U.S.C. § 651-658 (1998). See Plapinger & Stienstra, *supra* note 1, at 3-4.

10. 28 U.S.C. § 471-482 (1997). Although the CJRA sunset on December 1, 1997, the section authorizing plans appears to remain in effect. Pub. L. No. 105-53, 111 Stat. 1173 (1997).

11. See Michael A. Perino, *Drafting Mediation Privileges: Lessons from the Civil Justice Reform Act*, 26 Seton Hall L. Rev. 1 (1995).

12. ADR Act, § 2, 112 Stat. at 2993. For discussion of additional values of mediation, see Robert A. Baruch Bush, "What Do We Need a Mediator For?": Mediation's "Value-Added" for Negotiators, 12 Ohio St. J. on Disp. Resol. 1 (1996) [hereinafter Bush, *What Do We Need a Mediator For?*]; Robert A. Baruch Bush, *Mediation and Adjudication, Dispute Resolution and Ideology: An Imaginary Conversation*, 3 J. Contemp. Legal Issues 1, 12 (1989-90) [hereinafter Bush, *Mediation and Adjudication*]; Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest*, 1995 J. Disp. Resol. 1, 10 (1995); Nancy H. Rogers & Craig A. McEwen, *Mediation: Law, Policy and*

The ADR process is defined as including any process or procedure in which a neutral third party participates to assist in the resolution of the issues. The Act includes early neutral evaluation, mediation, minitrial and arbitration as processes which a district court may elect to require. At least one of the enumerated processes must be provided to all litigants in civil cases. District courts are specifically directed to "consider including mediation" within their local ADR program.<sup>13</sup> Mediation was the primary ADR process that existed in the federal courts prior to the 1998 Act.<sup>14</sup>

Mediation is a consensual process in which a third person, i.e. a mediator, helps disputing parties negotiate to achieve a mutually agreeable settlement.<sup>15</sup> Congress recognized that confidentiality is crucial to successful mediations<sup>16</sup> because it encourages frank and full discussions and is necessary to assist the neutral mediator and the parties to identify interests, develop solutions and reach agreement.<sup>17</sup> The Act requires each district by local rule to "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."<sup>18</sup>

### III. LOCAL RULES AND STANDING ORDERS

Even before the implementation of the 1998 Act, most federal district courts had implemented some form of court-based alternative dispute resolution program by the adoption of a local rule or a standing order.<sup>19</sup> The remainder of districts will do so in the near future as the result of the directive in the 1998 Act to adopt a court-based program. The districts which have enacted a program have not followed a single model but rather adopted the court-based ADR process that would best fit its jurisdiction.<sup>20</sup> Most of

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Practice 20-28 (2d ed. 1994). See *infra* notes 107-108 and accompanying text.

13. ADR Act, § 2(3), 112 Stat. 2993.

14. See Plapinger & Stienstra, *supra* note 1, at 4.

15. Rogers & McEwen, *supra* note 12, at § 1.01.

16. 28 U.S.C. § 652(d) (1997).

17. See Kirtley, *supra* note 12, at 8-10; Irene Stanley Said, *The Mediator's Dilemma: The Legal Requirements Exception to Confidentiality under the Texas ADR Statute*, 36 S. Tex. L. Rev. 579, 590 (1995); James M. Assey, Jr., *Mum's the Word on Mediation: Confidentiality and Snyder-Falkinham v. Stockburger*, 9 Geo. J. Legal Ethics 991 (1996); Michael L. Prigoff, *Toward Candor or Chaos: The Case of Confidentiality in Mediation*, 12 Seton Hall Legis. J. 1, 1-2 (1988); Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 Ohio St. J. on Disp. Resol. 1 (1986); Rogers & McEwen, *supra* note 12, at ch. 9.

18. 28 U.S.C. § 652 (1997).

19. See Plapinger & Stienstra, *supra* note 1, at 3-4 for a discussion of the development of ADR in the federal district courts. ADR was also encouraged by The Civil Justice Reform Act of 1990, which recommends ADR as one of six civil case management principles.

20. See *id.* at 15, Table 1 for the range and number of court-based programs established in the district courts.

the districts which adopted a program included a provision relating to confidentiality of the process conducted pursuant to that standing order or rule.<sup>21</sup> These rules do not provide protection for mediation proceedings conducted outside the district's court-based program, whether mediation was in conjunction with a state-court proceeding or as voluntary pre-suit mediation in a matter which is subsequently litigated in federal court.

There is no commonality or uniformity in the confidentiality provisions adopted by the districts as a part of their local ADR program. Some confidentiality rules apply only to the specific type of ADR approved in the district, such as early neutral evaluation,<sup>22</sup> arbitration,<sup>23</sup> summary jury trial,<sup>24</sup> judicially hosted

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21. See *id.* at 71-307.

22. N.D. Cal. ADR L.R. 5-13(a) ("The court . . . extends to all . . . communications [during ENE] all the protection afforded by FREvid 408. . . . In addition, . . . the court hereby prohibits disclosure of any written or oral communication made by any party, . . . during any ENE session. . . . Nor may such communication, . . . [be] used for any purpose, including impeachment, in any pending or future proceeding in this court."); D.C. Civil Justice Expense and Delay Reduction Plan App. D(VII)(B) ("No communication made in connection with or during any ENE session may be disclosed or used for any purpose in any pending or future proceeding in the U.S. District Court for the District of Columbia."); N.D.N.Y. L.R. 83.12-8(1) ("Early Neutral Evaluation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during the ENE session."); N.D. Ohio L.R. 16.5(h) ("The entire E.N.E. process is confidential. The parties and the Evaluator shall not disclose information regarding the process, including settlement terms, to the Court or to third persons. . . ."); Vt. L.R. 16.3(k)(1) ("All written and oral communications made in connection with or during the ENE [Early Neutral Evaluation] process are confidential. The ENE process is treated as a settlement negotiation under Fed. R. Evid. 408.").

23. M.D. Fla. R. 8.06 (In a trial de novo following an arbitration proceeding, "the Court shall not admit evidence that there has been an arbitration proceeding, . . . or any other matter concerning the conduct of the arbitration proceeding, except that testimony given at an arbitration hearing may be used for any purpose otherwise permitted by the Federal Rules of Evidence"); N.D.N.Y. L.R. 83.7-5(e) ("no transcript of the [arbitration] proceeding shall be admissible in evidence at any subsequent de novo trial of the action."); N.D. Ohio L.R. 16.7(1)(2) ("The assigned Judge shall not admit at the trial de novo any evidence that there has been an arbitration proceeding. . . . unless: (A) The evidence would otherwise be admissible under the Federal Rules of Evidence."); S.D. Ohio Order 85-1 (11.1) ("no evidence shall be received that there had been an arbitration proceeding . . . any statement of a party or a witness may be used in the same manner as permitted by the Federal Rules of Evidence."); E.D. Pa. Civ. R. 53.2(7)(C) (Evidence of an arbitration proceeding is inadmissible "unless the evidence would otherwise be admissible in the Court under the Federal Rules of Evidence.").

24. D. Mass. R. 4.03(c)(4) ("Neither the [summary jury trial] panel's advisory opinion nor its verdict, nor the presentations of the parties shall be admissible as evidence in any subsequent proceeding, unless otherwise admissible under the rules of evidence."); E.D. Okla. Civil Justice Expense and Delay Reduction Plan IV(B)(4) ("Neither the panel's advisory opinion nor its verdict, nor the presentation of the parties, shall be admissible as evidence in any subsequent proceedings, unless otherwise admissible under the rules of evidence."); W.D. Wash. Cv. R. 39.1 (e)(6) ("[T]he proceedings [of a summary jury trial] will not be reported or recorded, and will remain confidential.").

settlement conference,<sup>25</sup> and mediation.<sup>26</sup> Other districts apply a general confidentiality provision to all ADR proceedings conducted in the district's court-based programs.<sup>27</sup> By contrast, there is no confidentiality provision in the programs adopted in a few districts.<sup>28</sup>

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25. E.D.N.C. R. 30.00 ("During the [court-hosted] settlement conference, the settlement Judge [and the] . . . parties [may confer] . . . with the specific understanding that any conversation relative to settlement will not constitute an admission and will not be used in any form in the litigation. . . ."); E.D. Okla. L.R. 16.3 ("The Settlement Judge may elect to have the parties and/or corporate representatives meet alone without the presence of the Settlement Judge or counsel with the specific understanding that any conversation relative to settlement will not constitute an admission, and will not be used in any form in the litigation"); N.D. Okla. Civ. R. 16.3(E) ("Any statement made in the context of the settlement conference will not constitute an admission and will not be used in any form in the litigation"); E.D. Tenn. L.R. 68.3(h) ("Settlement discussions [during judicially hosted settlement conferences] are confidential as provided by Rule 408, Fed. R. Evid."); M.D. Tenn. L.R. 22(d)(3) ("No part of any of the contents of the discussions or any statements made or information provided to the Court and/or to any other party or counsel during a [judicially hosted] settlement conference shall be used by any party . . . in the litigation. . . . This protection includes, but is not limited to, the protection provided by Rules 408 and 409 of the Federal Rules of Evidence."); Wyo. Civ. R. 16.3 (c)(5) ("Any memoranda submitted pursuant to this rule [at a judicially hosted settlement conference] shall be treated by the person conducting the settlement conference as confidential.").

26. M.D. Pa. L.R. 16.8.6 ((c) "All proceedings at any mediation session authorized by this rule . . . shall not be used by any adverse party for any reason in the litigation at issue. . . . (f) The mediator shall not be called as a witness at trial."); W.D. Pa. L.R. 16.3.5(E) ("All counsel and parties shall treat as confidential all written and oral communications made in connection with or during any [mediation] conference and no such communications may be disclosed to anyone not involved in the litigation. Nor may any such communication be used for any purpose (including impeachment) in the civil action or in any other proceedings."); D. Neb. L. R. 53.2(d)(4) ("The mediation session(s) constitute settlement negotiations. Notwithstanding the provisions of Rule 408, Fed. R. Evid., all statements, whether written or oral, made only during the course of the mediation proceeding shall be deemed to be confidential and shall not be admissible in evidence for any reason in the trial of the case"); N.D.N.Y. L.R. 83.11-5(4) ("Mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without the consent of the other parties, any confidential information acquired during mediation."); E.D.N.C. R. 32.07(h) ("All proceedings of the mediated settlement conference, including any statement by any party . . . , shall, in all respects, be privileged.").

27. E.D. Mo. Order 98-504 R. 16-6.04 ("A neutral may exclude all persons other than the parties and their counsel from ADR conferences. All written and oral communications made or disclosed to the neutral are confidential and may not be disclosed . . . . The neutral shall not testify regarding matters disclosed during ADR proceedings."); W.D. N.C. Civil Justice Expense and Delay Reduction Plan Section Four (III)(C) ("ADR proceedings and information relating to or disclosed during those proceedings shall be governed by Rule 408 of the Federal Rules of Evidence. A neutral may not be deposed or called as a witness . . . at any subsequent proceeding"); W.D. Tex. R. CV-88(g) ("[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.").

28. See N.D. Ind. L. R. 53.2; Ky. (E.D. and W.D.), Perino, *supra* note 11, at 17.

Similarly, the local rules provide differently for the extent of the protection given confidentiality.<sup>29</sup> Some districts simply provide the process is confidential

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In Louisiana, the three district courts have adopted Uniform Local Rules of the United States District Courts for the Eastern, Middle, and Western Districts of Louisiana. Prior to the enactment of the 1998 ADR Act, these uniform local rules did not contain provisions relating to mediation or ADR. On June 2, 1999, the Uniform Local Rules for the United States District Court for the Eastern District of Louisiana were amended by adding L.R. 16.3.1E which deals with ADR and specifically provides in Section (d) that "All alternative dispute resolution proceedings shall be confidential."

The Civil Justice Expense and Delay Reduction Plan for the Eastern District and the Civil Justice Reform Act Plan adopted by the Middle District both provide that the presiding judicial officer has the authority to refer cases to ADR; the plans do not contain any specific provisions concerning ADR or mediation and do not contain a provision relating the confidentiality of the ADR proceeding. See Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Eastern District of Louisiana, 2 Federal Local Court Rules (2d ed. West 1997 and Supp. Feb. 1998); Civil Justice Reform Act Plan of the United States District Court for the Middle District of Louisiana, 2 Federal Local Court Rules (2d ed. West 1997 and Supp. Feb. 1998). Section IV of the Civil Justice Reform Act Plan of the Western District provides that the court "encourages alternative dispute resolution" but that "the court will not establish formal procedures for arbitration or mediation." Sec. IV, Civil Justice Expense and Delay Reduction Plan of the United States District Court for the Eastern District of Louisiana, 2 Federal Local Court Rules (2d ed. West 1997 and Supp. Feb. 1998).

The Eastern District entered an order on December 8, 1997 adopting the Fifth Circuit Model Equal Employment Opportunity and Employment Dispute Resolution Plan which contains a provision authorizing the mediation of a claim under the Plan and setting forth detailed procedures. Section 6.B.4 of Chapter IX provides: "Any person or party involved in the mediation process shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties."

An internet webpage of the Middle District entitled: "Mediation in the Middle District," provides that in order to establish mediation in the Middle District the parties must execute a confidentiality agreement in which they agree that nothing said during the mediation shall be admissible at trial, disclosures during private meetings are confidential and that no subpoena shall issue to the mediator requesting testimony. *Mediation in the Middle District* (visited Jul. 1, 1999) <<http://www.lamd.uscourts.gov/mediation.htm>>. The Clerk of the United States District Court for the Middle District of Louisiana distributes a mediation packet which requires the parties who choose mediation to execute the confidentiality agreement. There are no local rules or standing orders cited with respect to this provision and apparently no Middle District local rule or standing order has been promulgated requiring the confidentiality agreement.

29. The federal courts have been reluctant to interpret a statute as creating an evidentiary privilege in the absence of clear statutory language. See *In re Grand Jury Subpoena*, 148 F.3d 487 (5th Cir. 1998) (In rejecting the argument that the Agriculture Credit Act which requires that the mediation sessions be "confidential" created a privilege, the court reasoned that there was no showing of clear manifestation that Congress intended to create a privilege.); *Martin v. Lamb*, 122 F.R.D. 143, 146 (W.D.N.Y. 1988) (Statute providing that police personnel records were "confidential" did not create an evidentiary privilege. "Merely asserting that a state statute declares that the records in question are 'confidential' does not make out a sufficient claim that the records are 'privileged' within the meaning of Fed. R. Civ. P. 26(b)(1) and Fed. R. Evid. 501."); *Roberts v. Carrier Corp.*, 107 F.R.D. 678, 682 (N.D. Ind. 1985)



without defining any additional protections;<sup>30</sup> other districts provide that evidence concerning the mediation or ADR is inadmissible;<sup>31</sup> still others specifically

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(Provision of Consumer Product Safety Act providing that certain information "shall be considered confidential and shall not be disclosed" did not create an evidentiary privilege and was subject to discovery in a civil proceeding.). See *Olam v. Congress Mortgage Co.*, No. 95-2806, 1999 WL 909731 n.15 (N.D. Cal. Oct. 15, 1999).

Statutes providing for confidentiality are "concerned with extrajudicial disclosures; privilege is concerned with disclosure in court. For example, a lawyer is under a duty of confidentiality which makes him liable to disciplinary sanctions and monetary damages if he reveals his client's secrets. The client has a privilege to prevent disclosure of confidential communications in the courtroom." Charles A. Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure: Evidence* § 5437 n.15 (1980). The duty of confidentiality is broader than the protection of an evidentiary privilege. See Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence* § 5.2, at 434 (1995).

30. M.D. Ala. L.R. 16.2(a) ("The court stresses that mediation is completely voluntary and confidential. The court strictly enforces the confidentiality of mediation."); P.R. Civil Justice Expense and Delay Reduction Plan R. V(D) ("This process [alternative dispute resolution/mediation] shall take place in the strictest confidentiality."); N.D. Tex. Civil Justice Expense and Delay Reduction Plan III(F) ("All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities."); S.D. Tex. L.R. 20(I) ("All communications made during ADR procedures are confidential and protected from disclosure and do not constitute a waiver of any existing privileges and immunities."); W.D. Wash. Civ. R. 39.1 (e)(6) ("[T]he proceedings [of a summary jury trial] will not be reported or recorded, and will remain confidential."); Wyo. Civ. R. 16.3 (c)(5) ("Any memoranda submitted pursuant to this rule [at a judicially hosted settlement conference] shall be treated by the person conducting the settlement conference as confidential.").

31. D. Ariz. L.R. 2.11(i)(8) ("[E]xcept as related to impeachment of a witness, no transcript of the [arbitration] proceedings shall be admissible in evidence at any subsequent trial de novo of the action."); C.D. Cal. Order 98-2 7.5 ("[A]ll settlement proceedings shall be confidential and no statement made therein shall be admissible in any proceeding in the case."); D.C. Civil Justice Expense and Delay Reduction Plan App. C(IV) ("A. Confidentiality will be ensured throughout the mediation process. . . . C. No papers generated by the mediation process will be included in Court files, and information about what transpires during mediation sessions will not at any time be made known to the Court."); D. Kan. R. 16.3 ("Settlement conference [including mediation] statements or memoranda submitted to the court or any other communications which take place during the settlement conference shall not be used by any party in the trial of the case."); M.D.N.C. L.R. 83.10(e) ("At the beginning of the mediated settlement conference, the mediator shall describe the following matters to the parties: (7) The inadmissibility of negotiating statements and offers at trial."); E.D. Pa. Civ. R. 53.2.1(5)(e) ("[N]othing communicated during the mediation process shall be placed in evidence, made known to the trial court or jury, or construed for any purpose as an admission."); M.D. Pa. L.R. 16.8.6 ((c) "All proceedings at any mediation session authorized by this rule . . . shall not be used by any adverse party for any reason in the litigation at issue. . . . (f) The mediator shall not be called as a witness at trial."); W.D. Pa. L.R. 16.3.5(E) ("All counsel and parties shall treat as confidential all written and oral communications made in connection with or during any [mediation] conference and no such communications may be disclosed to anyone not involved in the litigation. Nor may any such communication be used for any purpose (including impeachment) in the civil action or in any other proceedings."); D. Neb. L. R. 53.2(d)(4) ("The mediation session(s) constitute settlement negotiations. Notwithstand-

provide that evidence of the mediation is inadmissible under Federal Rule of Evidence 408<sup>32</sup> or is privileged.<sup>33</sup> Still other district's local rules are not

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ing the provisions of Rule 408, Fed. R. Evid., all statements, whether written or oral, made only during the course of the mediation proceeding shall be deemed to be confidential and shall not be admissible in evidence for any reason in the trial of the case."); D. S.C. Civ. R. 16.07(C) ("Communications during the mediation conference shall be confidential. The parties, their attorneys and other persons present shall maintain the confidentiality of the mediation and shall not rely on, introduce or attempt to introduce as evidence in any arbitral, judicial or other proceeding, any event, document or communication relating in any way to the mediation."); W.D. Tex. R. CV-88(g) ("[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, . . . is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding."); D. Utah Civ. R 16-3(d) ("If the case does not settle [after a judicially hosted settlement conference], no oral or written communication made during the settlement conference may be used in the trial of the case or for any other purpose."); E.D. Wash. L.R. 16.2(g)(7) ("[N]o transcript of the [arbitration] proceedings shall be admissible in evidence at any subsequent de novo trial except for purposes of impeachment.").

32. N.D. Ala. Bankr. R. 9019-2(IV)(B)(11) ("[T]he entire mediation process is confidential! . . . The mediation process must be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and State rules of evidence."); Conn. Civ.R.36(5) ("All ADR sessions shall be deemed confidential and protected by the provisions of Fed. R. Evid. 408 and Fed. R. Civ. P. 68."); N.D. Ga. L.R. 16.7(L) ("The ADR process must be treated as a compromise negotiation for purposes of the Federal Rules of Evidence and Georgia rules of evidence. The ADR neutral is disqualified as a witness, . . . in any pending or future action relating to the dispute . . ."); W.D. Mich. L. R. 16.2 (e) ("All ADR proceedings are considered to be compromise negotiations within the meaning of Fed. R. Evid. 408."); W.D. Pa. L. R.16.2.8(C) (Evidence relating to arbitration proceeding is inadmissible "unless the evidence would otherwise be admissible in the court under the Federal Rules of Evidence."); E.D. Tenn. L.R. 16.4(h) ("The Mediation Conference and all proceedings relating thereto . . . , are confidential and are inadmissible to the same extent as discussions of compromise and settlement are inadmissible under Federal Rule of Evidence 408."); M.D. Tenn. L.R. 27 ("All ADR proceedings under these Rules and matters relating thereto . . . , are deemed confidential and are inadmissible as evidence to the same extent as discussions of compromise and settlement are inadmissible under Federal Rule of Evidence 408."); D. Utah R. ADR Plan(6)(i) ("All proceedings in any mediation conference conducted under this plan, including any statement by any party, attorney or representative, are conclusively deemed to be made in compromise negotiations within the meaning of Fed. R. Evid. 408."); N.D. W.Va. L.R. Civ. P. 5.01(e) ("Mediation shall be regarded as confidential settlement negotiations, subject to Rule 408 of the Federal Rule of Evidence.").

33. E.D. Cal. L.R. 16-271(g) ("The Court extends to all . . . communications [made during ENE] all the protections federal courts and Federal Rule of Evidence 408 give to communications made in settlement negotiations or to offers of compromise. In addition, no communication made during any session may be disclosed by the parties, . . . or used for any purpose (including impeachment or to prove bias or prejudice of a witness) in any pending or future proceeding in this Court."); N.D. Cal. ADR L.R. 6-11(a) ("The court hereby extends to all . . . communications [during mediation] all the protection afforded by [Fed. R. Evid.] 408. . . . In addition, the court hereby prohibits disclosure of any written or oral communication made by any party . . . during any mediation [session] to anyone not involved in the litigation. Nor may such communication, . . . [be] used for any purpose, including

clear.<sup>34</sup>

The confidentiality provisions in the local rules apply to ADR proceedings held pursuant to the district's local rule and order. Usually, these confidentiality provisions do not protect ADR proceedings held outside that district's court-based ADR process. For example, if a federal grand jury subpoenaed evidence relating

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impeachment, in any pending or future proceeding in this court."); S.D. Cal. Civ. L.R. 16.3(h) ("The [mandatory] settlement conference will be off the record, privileged and confidential. . . ."); M.D. Fla. R. 9.07(b) ("All proceedings of the mediation conference, . . . are privileged in all respects."); S.D. Fla. General R. 16.2(G)(2) ("All proceedings of the mediation conference, . . . are privileged in all respects."); N.D. Ill. General R. 5.10 (C) ("All mediation proceedings, . . . shall, in all respects, be privileged. . . ."); E.D. N.C. R. 32.07(h) ("All proceedings of the mediated settlement conference, including any statement by any party, . . . shall, in all respects, be privileged. . . ."); N.D. N.Y. R. 83.11-5(4) ("Mediation is regarded as a settlement procedure and is confidential and private. No participant may disclose, without consent of the other parties, any confidential information acquired during mediation."); D. Mass. R. 4.03(d)(6) ("Mediation proceedings shall be regarded as settlement proceedings and any communication related to the subject matter of the dispute made during the mediation . . . shall be a confidential communication. No admission, . . . or other confidential communication made in setting up or conducting the proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery."); E.D. Wash. L.R. 16.2(d)(3) ("All proceedings of the mediation conference, including any statement made by any party, . . . shall . . . be privileged and not . . . made known to the trial court or jury."); W.D. Wash. Civ. R. 39.1(C)(5) ("All proceedings of the mediation conference, including any statement made by any party, . . . shall, . . . be privileged and not . . . made known to the trial court. . . ."); S.D. W.Va. L.R. Civ. P. 5.01 (f) ("All proceedings of the mediation conference, including any statement made by any party, . . . shall be privileged and not . . . made known to the assigned judicial officer. . . ."); D. Or. R. 16.4(d)(1) ("All proceedings of the mediation conference, . . . will, in all respects, be privileged. . . .").

The Plan for Alternative Dispute Resolution and Settlement Procedures and Rules of Practice for the Western District of Oklahoma in Local Civil Rule 16.3 provides for mediation, ENE, arbitration, summary jury trial and summary bench trial. Each process is protected by the following language: "The Court extends to all such communications all the protection afforded by Rule 408 Federal Rules of Evidence and by Rule 68 Federal Rules of Civil Procedure. In addition, unless otherwise stipulated by all parties and the . . . [neutral], the Court prohibits disclosure of any written or oral communication made . . . in connection with or during any . . . [ADR] session to anyone not involved in the litigation. Nor may such . . . communication, absent stipulation by all parties and the mediator, be disclosed . . . or used for any purpose, . . . in any pending or future proceeding in this Court." W.D. Okla. L. Civ. R. 16.3 Supp. § 3.7.

34. 5th Cir. Model Equal Employment Opportunity and Employment Dispute Resolution Plan, Ch. IX, § 6(B)(4) ("Any person or party involved in the mediation process shall not disclose, . . . any information or records obtained through, or prepared specifically for, the mediation process, except as necessary to consult with the parties or their representatives, and then only with notice to all parties."); V.I. Civ. R. 3.2(c)(1) ("The mediator has a duty to define and describe the process of mediation . . . during an orientation session with the parties before the mediation process begins. The orientation should include the following: D. The confidentiality provision as provided for by Title 5, Section 854 of the Virgin Islands Code [attorney-client privilege.]; E.D. Wis. R. 7.12 ("Any documentation or proposal submitted under this rule [at a judicially hosted settlement conference] shall not become part of the official court record.").

to a mediation which occurred in connection with a state court proceeding, the confidentiality provisions of the district's local rules are not applicable.

The 1998 Act authorized each district by local rule to provide for the confidentiality of the ADR process and "to prohibit disclosure of confidential dispute resolution communications."<sup>35</sup> The statutory language does not clearly grant the authority to the district courts either to promulgate new testimonial privileges or to expand the protections of Federal Rule of Evidence 408. The local rules adopted prior to the 1998 Act, as well as those that are adopted subsequently, cannot be inconsistent with Acts of Congress and the rules of practice and procedure for the federal courts.<sup>36</sup> Although the Civil Justice Reform Act may validate the local rules relating to confidentiality, it is doubtful that individual district courts were granted the authority, as each saw fit, to create new evidentiary privileges through the local rule-making power.<sup>37</sup> Federal Rule of Evidence 501 provides that the only exceptions to the recognition of evidentiary privileges "under the principles of the common law" are those embodied in the Constitution, federal statute or rules promulgated by the Supreme Court.

In addition to being inconsistent, poorly drafted and sometimes confusing, the local rules demonstrate that there is no consensus among the district courts as to the extent of the protection afforded mediation and other forms of court-based ADR. The local rules may serve as a trap for the unwary practitioner from outside the district who mediates in a court-based program. Counsel may make the misguided assumption that the foreign district's rule relating to confidentiality is the same as the district in which counsel normally practices. Significant variance in the provisions of local rules dealing with the same issue is poor public policy.

Even if local rules clearly and uniformly state the extent of the protection given confidentiality of mediation, the protection is limited to federal district court-based programs. Voluntary or pre-suit mediations are not protected by the local rule. Neither is evidence of mediation proceedings in state courts.

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35. 28 U.S.C. § 652 (1997).

36. See *Baylson v. Disciplinary Bd.*, 975 F.2d 102 (3d Cir. 1992); *Carver v. Bunch*, 946 F.2d 451 (6th Cir. 1991); *Holloway v. Lockhart*, 813 F.2d 874 (8th Cir. 1987); James W. Moore, 14 *Moore's Federal Practice* § 83.04 (3d ed. 1994); Charles Allen Wright et al., *Federal Practice and Procedure* §§ 3152-3153 (1999).

37. See Wright et al., *supra* note 36, at § 3152 ("[T]he CJRA should not bear on the validity of local rules adopted pursuant to Rule 83."). In ruling on whether a federal court-sponsored mediation proceeding was confidential in a subsequent motion to set aside a mediation agreement, a magistrate judge in *Olam v. Congress Mortgage Co.*, No. 95-2806, 1999 WL 909731 (N.D. Cal. Oct. 15, 1999), indicated that "It is not likely that Congress [in enacting the ADR Act] intended to give 94 district courts the power to vary in potentially quite different ways the proviso in Rule 501." *Id.* at \*10. The judge further opined that: "[E]ven when a local rule adopted by a federal district court pursuant to § 652(d) offers more protection to mediation communications than would be offered by the law of the state where the district court sits, the federal court must apply state privilege law when state substantive law is the source of the rule of decision on the claim to which the proffered evidence from the mediation is relevant." *Id.* at \*13.

## IV. FEDERAL RULE OF EVIDENCE 408

## A. Generally

The policy of fostering free and frank discussions in negotiations which lead to settlement and compromise of actions prior to trial is recognized in Federal Rule of Evidence 408.<sup>38</sup> Offering or accepting or promising to offer or accept a valuable consideration in compromising or attempting to compromise a claim is not admissible to prove liability for the claim. Rule 408 not only protects against the admission of offers of settlement and compromise but also prohibits the admission of statements or admissions of fact which are made during settlement discussions.<sup>39</sup>

Many jurisdictions at common law limited the protection of the exclusionary rule only to the offers of settlement themselves and not to statements of fact or admissions of fault which were made during the settlement negotiations. However, the drafters of the Federal Rules rejected this distinction on the basis that such a limitation in Rule 408 would hamper "free communication between parties." There would be "an unjustifiable restraint upon efforts to negotiate settlements" and that continuing to recognize this distinction would be "a preference for the sophisticated, and a trap for the unwary."<sup>40</sup>

Two theories have provided a rationale for the rule that offers of settlement and compromise are inadmissible on the issue of liability for the underlying claim.<sup>41</sup>

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38. Rule 408 has been codified without substantial amendment in 38 states. Jack B. Weinstein & Margaret A. Berger, 6 Weinstein's Federal Evidence (Joseph M. McLaughlin ed., 2d ed. 1998) (Listing in Table of State and Military Adaptations).

39. See Wright & Graham, *supra* note 29, §§ 5301-5315; Michael Graham, Handbook of Federal Evidence § 408.1 (4th ed. 1996).

40. S. Rep. No. 93-1277 at 10 (1974), reprinted in 1974 U.S.C.C.A.N. 7051, 7056. The Department of Justice opposed this amendment claiming that the proposed rule would require the exclusion of admissions of fact made during settlement negotiations. *Proposed Rules of Evidence: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong. 345 (1973). The department argued that it would immunize statements admitted to government investigators during what a court may later characterize as a settlement negotiation rather than an investigation. Thus, the proposed rule would further perjury if citizens could deny what was admitted or could make false representations without fear of impeachment.

The "trap for the unwary" justification flowed from many courts applying the common law rule drawing a distinction between an admission of fact made during negotiations for compromise and an admission of fact that was stated hypothetically: "Admitting for the sake of this discussion only." The former were admissible against the party making them; the latter were protected from admission. Only the sophisticated or those represented by counsel were aware of the distinction and phrased their statements accordingly. In rejecting this distinction, the Advisory Committee noted that: "An inevitable result [of the common law rule] is to inhibit freedom of communication with respect to compromise even among lawyers." Fed. R. Evid. 408 advisory committee's notes.

41. *Morley-Murphy Co. v. Zenith Electronics Corp.*, 910 F. Supp. 450, 456 (W.D. Wis.

Wigmore's view is that an offer of compromise is not motivated from a belief that the adversary's claim is well-founded but rather a desire for peace.<sup>42</sup> Therefore, he argues that the offer of compromise is not relevant because it does not signify an admission. There is no express or implied concession by a party when a offer is made.<sup>43</sup>

Most modern commentators argue that the justification for the rule excluding offers of compromise is not relevance, but one of evidentiary privilege.<sup>44</sup> This rationale recognizes the strong public policy favoring negotiated dispute resolution requires that offers of compromise be made without fear the offer will be used against the offeror.<sup>45</sup>

The protections of Rule 408 to encourage free communication are available in all settlement and compromise negotiations. They include the traditional informal settlement discussions which occur between parties and counsel. The protection is applicable to all types of alternative dispute resolution, regardless of whether the jurisdiction additionally recognizes an additional protection for mediation; e.g. a local rule of a federal district court or a statute creating a privilege for mediation proceedings. Rule 408 applies regardless of whether some more specific protection is applicable. In other words, if a court determines that a testimonial mediation privilege will not be recognized or is not applicable, Rule 408 may still bar the evidence when it is offered at trial.

No specific statute or court-rule is necessary for Rule 408 to be applicable in mediation proceedings, regardless of whether the mediation is voluntary or court-ordered. Mediations involve statements made during attempts to settle or

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1996).

42. 4 John H. Wigmore, Evidence § 1061, at 36 (Chadbourn rev. 1972).

43. Wigmore's theory focuses on the motivation of the party who makes the statement. However, as McCormick reasons, this theory may be applicable to offers by a party asserting an unfounded defense, but is inapplicable to a party who offers to pay ninety percent of an asserted claim. See Charles T. McCormick, Evidence § 76, at 158 (1954). In the latter situation, it is reasonable to assume that the party making the offers believes the adversary's claim is well-founded. Moreover, offers of compromise meet the modern theory of relevancy expressed in Federal Rule 401. The issue is whether evidence of the offer has some logical tendency to prove a material fact and are relevant. Any offer of compromise might reasonably suggest to the finder-of-fact that the party making the offer believed the opponent's position had substantial merit. The fact-finder can weigh this evidence together with the other evidence, and accept or reject it.

44. Wright & Graham, *supra* note 29, § 5302, at 170-73; 2 Weinstein & Berger, *supra* note 38, at 408; McCormick on Evidence 72.1 at 271 (John William Strong ed., 4th ed. 1992).

Another rationale which has gained little acceptance in this country is to treat the matter as one of express or implied contract. For cases accepting this rationale, see *Gibbs v. Johnson*, 10 F. Cas. 297, 300 (C.C.D.C. 1860) and *Sommerville Water Co. v. Borough of Sommerville*, 78 A. 793, 794 (N.J.Ch. 1911). If an offer of compromise was made which included the words "without prejudice" a unilateral implied contract is created which provides that the offer was not admissible in evidence. See Wright & Graham, *supra* note 29, § 5302, at 169, 171-72.

45. See *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985); Wright & Graham, *supra* note 29, § 5302, at 170.

compromise a claim. However, some district court local rules<sup>46</sup> as well as some states have specifically adopted a provision which applies Rule 408 to mediation proceedings, probably as a reminder to counsel and the parties.<sup>47</sup>

### B. Inapplicability

Rule 408 precludes the admission at trial of evidence of settlement negotiations which are offered to prove liability for the underlying claim.<sup>48</sup> The second sentence of Rule 408 cautions that documents presented during settlement negotiations are not protected simply because they were so presented. In other words, the rule is not a shield behind which one can divulge pre-existing documents during settlement discussions or negotiations and have them protected from admissibility during trial.

The rule does not prohibit discovery of matters pertaining to the settlement negotiations.<sup>49</sup> However, because a party is aware of the statements made by the opponent during the negotiations or the joint sessions, the availability of discovery

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46. See *supra* notes 25-27.

47. Vt. R. Evid. 408 ("Evidence of conduct or statements made in compromise negotiations, including mediation, is likewise not admissible."); Ind. R. Evid. 408 ("Compromise negotiations encompass alternative dispute resolution."); Me. R. Evid. 408(a) ("Evidence of conduct or statements made in compromise negotiations or in mediation is also not admissible on any substantive issue in dispute between the parties.").

48. See *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898, 909 (2d Cir. 1997); *Uforma/Shelby Bus. Forms, Inc. v. NLRB*, 111 F.3d 1284, 1293-94 (6th Cir. 1997); *United States v. Hauert*, 40 F.3d 197, 199-200 (7th Cir. 1994).

Rule 408 is inapplicable when there is not a dispute as to the validity or amount of the underlying claim. See *In re B.D. Int'l Discount Corp.*, 701 F.2d 1071, 1074 (2d Cir. 1983) (in bankruptcy proceeding, proper to admit statement by president of bankrupt corporation acknowledging accuracy of claims because at the time of negotiation the corporation did not dispute claim in question but simply sought more time for payment).

49. See *NAACP Legal Defense and Educ. Fund, Inc. v. U.S. Dep't of Justice*, 612 F. Supp. 1143, 1146 (D.C. Cir. 1985) ("Although the intent of FRE 408 is to foster settlement negotiations, the sole means used to effectuate that end is a limitation on the admission of evidence produced during settlement negotiations for the purpose of proving liability at trial. It was never intended to be a broad discovery privilege."); Peter N. Thompson, *Confidentiality, Competency and Confusion: The Uncertain Promise of the Mediation Privilege in Minnesota*, 18 Hamline J. Pub. L. & Pol'y 329 (1997); Rogers & McEwen, *supra* note 12, at § 9:07.

A confidentiality clause in a settlement agreement followed by a court-order may not prevent a third party from discovery of information that the parties to the agreement agreed not to disclose. *Datapoint Corp. v. Picturatel Corp.*, No. 93-2381, 1998 WL 51356 (N.D.Tex., Jan. 23, 1998); *Barger v. Garden Way, Inc.*, 499 S.E.2d 737 (Ga. App. 1998); *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 344-46 (3d Cir. 1986). At least one state has a statutory provision prohibiting the court from entering an order concealing information concerning a product or condition which "has caused or is likely to cause injury." Fla. Stat. ch. 69.081(3) (1997).

is not as significant as it is when the party is unaware of the evidence. Although Rule 408 does not prohibit discovery of an opponent's communications regarding negotiation strategies, Rule 26(c) of the Rules of Civil Procedure<sup>50</sup> as well as the attorney-client privilege and the work product doctrine may be applicable to protect these discussions.

Rule 408 is only applicable when the offer of compromise is offered to prove liability. The final sentence of Rule 408 provides that the rule does not require the exclusion of evidence relating to settlement offers when it is offered for another purpose, "such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."<sup>51</sup> This sentence illustrates some of the purposes for which the rule would not exclude evidence; it is not an exclusive listing.<sup>52</sup>

### *1. Bias or Prejudice*

If a witness testifies during a trial, the cross-examining counsel may attack the credibility by showing a relevant bias, prejudice or interest.<sup>53</sup> Evidence of a settlement agreement involving the witness is admissible when it is relevant to show the bias of the witness when testifying in the instant case.<sup>54</sup> The language of Rule 408 does not prohibit admission of the evidence since it is not offered to show the validity or invalidity of the underlying claim. The second sentence of Rule 408 specifically recognizes that evidence of the prior settlement may be admitted to show bias. The details of the settlement agreement are subject to a Rule 403 balancing, as are the details of other evidence being offered to attack credibility by showing bias.<sup>55</sup>

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50. The rule authorizes the court to enter a protective order "for good cause shown . . . which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." See *Assey*, *supra* note 17, at 996; *Green*, *supra* note 17, at 25.

51. See *United States v. Austin*, 54 F.3d 394, 400 (7th Cir. 1995); *McInnis v. A.M.F., Inc.*, 765 F.2d 240 (1st Cir. 1985).

52. Fed. R. Evid. 408 Advisory Committee's Notes. Maine has amended Rule 408 to preclude admission of settlement discussions made during family court mediation regardless of the reason the evidence is offered. Me. R. Evid. 408(b).

53. See *United States v. Abel*, 469 U.S. 45, 105 S. Ct. 465 (1984). Evidence which is inadmissible for other purposes may be admissible to show bias. See *Davis v. Alaska*, 415 U.S. 308, 94 S. Ct. 1105 (1974); *John McShain, Inc. v. Cessna Aircraft Co.*, 563 F.2d 632, 635 (3d Cir. 1977).

54. See *Reichenbach v. Smith*, 528 F.2d 1072 (5th Cir. 1976); *Robertson v. White*, 113 F.R.D. 20 (W.D. Ark. 1986).

55. See *Abel*, 469 U.S. at 50-54, 105 S. Ct. at 468-70.



## 2. Act or Wrong Committed During Settlement Negotiations

When the question is not the validity or invalidity of the underlying claim, but rather a material issue of an act which occurred during the negotiations, Rule 408 does not prohibit the admission of evidence.<sup>56</sup> For example, when an alleged wrong is committed during the negotiations; e.g., libel,<sup>57</sup> assault, breach of contract,<sup>58</sup> or unfair labor practice,<sup>59</sup> the evidence of statements made during negotiations is not being offered to prove the liability for the underlying claim and is not prohibited. Wrongful acts are not protected simply because they occurred during settlement discussion.<sup>60</sup> The rule excluding settlement offers and discussions was not intended to be a shield for the commission of independent wrongs.<sup>61</sup> So too, if a suit alleging that an insurance company failed to make a reasonable settlement within the policy limits, either the insured or the insurance company can offer evidence of the settlement offers that were made during the negotiations.<sup>62</sup>

## 3. Impeachment

If a party testifies during the trial, a statement of fact made by the party during settlement negotiations may be offered as a prior inconsistent statement to impeach credibility.<sup>63</sup> Applying the literal language of Rule 408, the evidence is not barred

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56. *Uforma/Shelby Business Forms, Inc. v. NLRB* 111 F.3d 1284, 1293-94 (6th Cir. 1997).

57. *See Krebs Pigment & Chem. Co. v. Sheridan*, 12 F. Supp. 254, 256 (E.D. Pa. 1934), *aff'd*, 79 F.2d 479 (3d Cir. 1935).

58. *See Westchester Specialty Ins. Serv., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505, 1512-13 (11th Cir. 1997) (admissible to resolve factual dispute about the meaning of settlement agreement's terms); *Bituminous Constr., Inc. v. Rucker Enter., Inc.*, 816 F.2d 965, 968-69 (4th Cir. 1987) (admissible to show Rucker's understanding of its obligations under the agreement and that Bituminous made demand for payment of the contract).

59. *See NLRB v. Gotham Indus., Inc.*, 406 F.2d 1306, 1313 (1st Cir. 1969).

60. *See Fletcher v. Western Nat'l Life Ins. Co.*, 89 Cal. Repr. 78, 89 (Cal. Ct. App. 1970) (Cal. Evid. Code § 1152 does not exclude evidence of intentional infliction of emotional distress when insurer "embarked upon a concerted course of conduct to induce plaintiff to surrender his insurance policy or enter into a disadvantageous 'settlement' of a nonexistent dispute by means of false and threatening letters and the employment of economic pressure based upon his disabled and, therefore impecunious, condition, (the very thing insured against) exacerbated by Western National's malicious and bad faith refusal to pay plaintiff's legitimate claim." *Fletcher*, 89 Cal. Repr. at 87.).

61. *See Harriman v. Maddocks*, 518 A.2d 1027, 1031 (Me. 1986).

62. *See White v. Western Title Ins. Co.*, 710 P.2d 309, 318 (Cal. 1985) (admissible to show breach of duty of good faith and fair dealing); *Pattison v. Valley Forge Ins. Co.*, 599 So. 2d 873, 877 (La. App. 4th Cir. 1992) (admissible to show reasonableness of insurer's conduct handling insured's claims); *Gelinas v. Metropolitan Property & Liab. Ins. Co.*, 551 A.2d 962, 968 (N.H. 1988) (admissible on issue of negligence in refusal to settle claim within policy limits).

63. *See Wright & Graham, supra* note 29, at §§ 5307, 5314.

because the evidence of the prior statement is not offered to prove the validity or invalidity of its claim. This interpretation is bolstered by the policy that the rules of evidence should not be a shield to commit perjury.<sup>64</sup> On the other hand, if a party's statements made during settlement negotiations are admissible to impeach whenever they are inconsistent with the party's trial testimony, the freedom of discussion in settlement negotiations will be inhibited. The few cases facing this issue are not in agreement.<sup>65</sup> Most commentators assume that there are, at least, some cases where the interests of justice compel the introduction of prior inconsistent statements made during settlement discussions.<sup>66</sup>

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64. Fed. R. Evid. 102 ("that the truth may be ascertained"). See *Davidson v. Beco Corp.*, 733 P.2d 781, 787 (Idaho Ct. App. 1986), modified by 753 P.2d 1253 (Idaho 1987); *Missouri Pac. R. R. Co. v. Arkansas Sheriff's Boys' Ranch*, 655 S.W.2d 389, 395 (Ark. 1983) (policy to "promote complete candor between the parties to the settlement negotiations but not to protect false representations").

65. Compare *EEOC v. Gear Petroleum, Inc.*, 948 F.2d 1542, 1545-46 (10th Cir. 1991) (in Age Discrimination suit, court excluded letters from employer's counsel to EEOC stating that the employee was laid off not only because of general reduction in force but also because the employee was "moving toward mandatory retirement at age 65" to use to impeach because they were made in the context of settlement negotiations) and *Derderian v. Polaroid Corp.*, 121 F.R.D. 9, 12 n.1 (D. Mass. 1988) (believing that the First Circuit "would not allow the admission of statements made at compromise negotiations even for impeachment purposes because in the usual case, an analysis of both nature of the claims in a case and the content of the purported statements would lead to the conclusion that such impeachment evidence would be nothing more than 'camouflaged' evidence on liability") with *County of Hennepin v. AFG Indus., Inc.*, 726 F.2d 149, 153 (8th Cir. 1984) (in county's action against builder's insurer and manufacturer of glass windows to determine cause of damage to curtain wall windows in county government center, evidence of county's settlement with insurer on claim of similar items as damages against manufacturer was admissible to impeach assertions that county had received windfall in amount of \$425,000 for \$83,000 claim against insurer for storm damage unrelated to curtain wall windows).

66. *Mueller & Kirkpatrick*, *supra* note 29, § 4.29, at 405-06 ("Statements made in the course of settlement discussions should be admitted for impeachment only in egregious circumstances where the interests of justice compel their introduction. If the statements are admitted, the fact that they were made in the course of settlement negotiations should be withheld from the jury."); Stephen A. Saltzburg & Kenneth R. Redden, *Federal Rules of Evidence Manual* 191 (3d ed. 1982) (except where a non-party is being impeached, courts should "decide against admitting statements made during settlement negotiations as impeachment evidence"); Jon R. Waltz & J. Patrick Huston, *The Rules of Evidence in Settlement*, 5.1 Litigation 11, 16 (1978) (Courts should "almost never" admit compromise evidence to impeach.). But see *Graham*, *supra* note 39, § 408.1, at 438 ("[S]tatements made during compromise negotiations should not be admissible as inconsistent statements to impeach.").

Federal Rule 408 and the Advisory Committee Notes are silent on this issue. The significance of this silence is unclear because of the specific treatment under other Federal Rules of Evidence of otherwise inadmissible evidence offered as prior inconsistent statements. Rule 407, which generally prohibits the admissibility of subsequent remedial measures which are offered to prove negligence or culpable conduct, specifically enumerates "impeachment" as one of the permissible purposes for which evidence of subsequent remedial measures is admissible. Thus, it can be argued that Congress' failure to include "impeachment" as a

When Rule 408 is applied to evidence of statements by the parties or counsel during mediation proceedings, it does not prohibit discovery but does prohibit evidence which is offered at trial to prove liability or the absence of liability for the claim. However, when a statement of a party is offered to prove a material issue other than liability, the evidence is not excluded. For example, if it is asserted that a mediation agreement was the result of duress which occurred during the mediation proceeding, Rule 408 would not prohibit the testimony of the witnesses to what occurred. So too, if a mediation between a witness and a party resulted in a settlement which required the witness to testify in favor of the party in another action, Rule 408 does not bar the admission of the settlement agreement. In at least a few cases, statements made during a mediation may be admissible as prior inconsistent statements to impeach a witness who testifies during a trial to material facts which are inconsistent with what the party stated during the mediation. Even through Rule 408 does not protect certain statements made during mediation, a district court's local rule may protect confidentiality.

## V. MEDIATION PRIVILEGE

### A. Federal Statutory Privilege

Currently, there is no federal statute recognizing a general mediation privilege which can be asserted to prohibit the introduction of evidence relating to mediation proceedings. However, a few federal statutes recognize that in specific types of actions or proceedings mediations are confidential<sup>67</sup> or privileged.<sup>68</sup> As a part of

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permissible purpose for evidence otherwise excluded by Rule 408 indicates its intent that evidence of statements made during settlement negotiations is not admissible as a prior inconsistent statement.

Federal Rule 410 which generally prohibits the admission of plea negotiations which occur in criminal prosecutions specifically provides that the evidence is not admissible for any purpose other than the two enumerated. It can be argued that if Congress had intended statements made during settlement negotiations to be inadmissible as prior inconsistent statements it would have adopted language in Rule 408 similar to that language in Rule 410.

Recognizing this uncertainty, Tennessee has added a sentence to Tennessee Rule of Evidence 408 which specifically states that "a party may not be impeached by a prior inconsistent statement made in compromise negotiations." *See also* Alaska R. Evid. 408.

67. 2 U.S.C. § 1416(b) (1997) (Congressional Accountability Act) ("All mediation shall be strictly confidential."); 3 U.S.C. § 456(b) (1997) (Extension of Certain Rights and Protections to Employees of Presidential Offices) ("All mediation under section 452 shall be strictly confidential.").

68. 5 U.S.C. § 574(a) (1997). At least one statute treats the issue as one dealing with admissibility of evidence at trial, rather than confidentiality or privilege. 20 U.S.C. § 1415(e)(2)(G) (1997) (Education of Individuals with Disabilities Act) ("Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings and the parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of such process.").

the federal Administrative Procedure Act, Congress has enacted a statutory mediation privilege which prohibits the disclosure of communications made during the mediation process under the APA.<sup>69</sup>

Most of these statutes have been infrequently interpreted, and when they have been addressed by the courts, the provisions have not been judicially construed to give broad protection.<sup>70</sup> For example, the Fifth Circuit in *In re Grand Jury Subpoena*<sup>71</sup> rejected the district court's determination that a federal mediation privilege protected against a federal grand jury subpoena for records of a mediation proceeding conducted pursuant to a state agricultural loan mediation program. Although the Agriculture Credit Act requires that the mediation sessions be "confidential," the court reasoned that there was no showing of clear manifestation that Congress intended to create a privilege which would shield the mediation proceeding from a federal grand jury.<sup>72</sup>

The 1998 Act did not create an evidentiary privilege to protect the confidentiality of mediation or the ADR process. In the Act, Congress spelled out in detail the extent of the protection afforded to confidentiality in court-annexed arbitration<sup>73</sup> but was silent as to the extent of protection granted to confidentiality in mediation or other types of court-annexed ADR. The Act provides that evidence "concerning the conduct of the arbitration proceeding" is inadmissible, "unless the evidence would otherwise be admissible in the court under the Federal Rules of Evidence; or the parties have otherwise stipulated."<sup>74</sup> Since Congress affirmatively stated that it was protecting the confidentiality of court-annexed arbitration only with the Federal Rules of Evidence, it is difficult to argue that by its silence, the Act creates an evidentiary privilege which is applicable to mediation or other ADR proceedings.

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69. 5 U.S.C. § 574(a) (1997) (Dispute Resolution in the Administrative Process) ("[A] neutral in dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication or any communication provided in confidence to the neutral, unless . . . (b) A party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication, unless. . .").

70. See *supra* note 29.

71. 148 F.3d 487 (5th Cir. 1998).

72. The opinion noted that the confidentiality of the mediation proceeding would not be severely compromised by disclosure to the grand jury due to the secrecy of the grand jury proceedings. *Id.* at 493.

73. See Plapinger & Stienstra, *supra* note 1, at 61 ("Court-annexed arbitration is an adjudicatory process in which one or more attorney arbitrators issue a non-binding judgment on the merits after an expedited, adversarial hearing in which the attorneys for each party present their cases. Witnesses are not called but exhibits may be submitted. The arbitrator's decision addresses only the disputed legal issues and applies legal standards. Either party may reject the nonbinding ruling and proceed to a trial de novo.").

74. ADR Act of 1998, Pub. L. No. 105-315, § 9, 112 Stat. 2993, 2997 (1998) (to be codified as amended at 28 U.S.C. § 657(c)(3) (1998)).

The 1998 Act provides that until rules are adopted providing for confidentiality of the ADR process, district courts shall adopt a local rule providing for the "confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications."<sup>75</sup> In this provision, Congress recognized the obligation to maintain the confidentiality of the dispute resolution process. The provision, however, does not address the admissibility of the evidence of ADR proceedings during a subsequent trial, or clearly create an evidentiary privilege as Congress did in federal administrative hearings.

### *B. Mediation Privilege under Federal Rule 501*

#### *1. Generally*

In promulgating the Federal Rules of Evidence, Congress rejected the Supreme Court's proposed fifteen rules governing the law of privilege in federal courts. Although it retained most of the other proposed federal rules, Congress adopted a single rule pertaining to privileges. Federal Rule of Evidence 501 provides that in federal courts the law of privilege is governed by "the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience."<sup>76</sup> The Rule also recognizes that the Constitution, an Act of Congress or rules promulgated by the Supreme Court pursuant to statutory authority may also recognize privileges. The final sentence of Rule 501 provides that in civil cases where the substantive law of a state supplies the rule of decision with respect to an element of a claim or defense, that state's law of privilege will be recognized in federal court. Thus, in a tort action where federal jurisdiction is based on diversity of citizenship, state substantive law applies and if that state has a mediation privilege, it will be applied in the federal litigation.<sup>77</sup>

In federal criminal prosecutions and in federal civil cases not based on diversity jurisdiction, Rule 501 provides that the privileges which are recognized shall "be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>78</sup> Thus, in a federal criminal action, an Internal Revenue Service investigation, or an action alleging a violation of federal anti-trust statutes, a state mediation privilege will not be recognized, even as to mediations which are ordered by a court of that state. In these cases, the issue is whether a "common law" mediation privilege is recognized

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75. ADR Act of 1998, Pub. L. No. 105-315, § 4, 112 Stat. 2993, 2995 (1998) (to be codified as amended at 28 U.S.C. § 652(d) (1998)).

76. Fed. R. Evid. 501.

77. *Id.* In *Olam v. Congress Mortgage Co.*, No. 95-2806, 1999 WL 909731 (N.D. Cal. Oct. 15, 1999), a magistrate judge considering a motion to enforce a mediation agreement found that despite a local rule protecting the confidentiality of the federal court-sponsored mediation, California law concerning the confidentiality of mediations was applicable since California substantive contract law was applicable.

78. Fed. R. Evid. 501.

under Rule 501, even when a state statutory mediation privilege protects the communication. Recently, the Fifth Circuit in *In re Grand Jury Subpoena*<sup>79</sup> rejected the district court's determination that a federal mediation privilege protected against a federal grand jury subpoena for records of a mediation proceedings conducted pursuant to a state agricultural loan mediation program, even though the mediation was conducted in Texas and was privileged under a Texas statute.

## 2. "Common Law" Privileges Under Rule 501

Recently, the Supreme Court has faced a number of claims urging the recognition of a new or novel evidentiary privilege and has provided principles for guidance in recognizing new privileges.<sup>80</sup> The Court has not articulated a precise test to apply to the recognition of a privilege. Rather it has interpreted Rule 501 as providing the federal courts with flexibility to develop rules of privilege on a case by case basis.<sup>81</sup> However, the Supreme Court has not been inclined "to exercise this authority expansively."<sup>82</sup> New privileges are not created lightly because of the "duty to give what testimony one is capable of giving"<sup>83</sup> and because evidentiary privileges are "in derogation of the search for truth."<sup>84</sup> The burden is on a party asserting the recognition of a new privilege to clearly show the necessity of the privilege.<sup>85</sup>

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79. 148 F.3d 487 (5th Cir. 1998).

80. See *infra* text accompanying notes 89-104.

81. *Jaffee v. Redmond*, 518 U.S. 1, 8, 116 S. Ct. 1923, 1927 (1996).

82. *University of Penn. v. EEOC*, 493 U.S. 182, 189, 110 S. Ct. 577, 582 (1990).

83. *Jaffee*, 518 U.S. at 9, 116 S. Ct. at 1928.

84. *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108 (1974). *Jaffee* pointed out that the common law principle which guides federal courts is the maxim that evidentiary or testimonial privileges are disfavored. "The common-law principles underlying the recognition of testimonial privileges can be stated simply. 'For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'" 518 U.S. at 9, 116 S. Ct. at 1928 (quoting *United States v. Bryan*, 339 U.S. 323, 70 S. Ct. 724 (1950) (quoting 8 John H. Wigmore, *Evidence* § 2192, at 64 (3d ed. 1940))).

85. *In re Sealed Case*, 148 F.3d 1073, 1076 (D.C. Cir. 1998) (Public good was not shown "with a high degree of clarity and certainty"); see also *Jaffee*, 518 U.S. at 17, 116 S. Ct. at 1932 (rejecting the balancing approach adopted by some state courts that a privilege would not apply where the evidentiary need for disclosure outweighed patient's privacy interest. "Making the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege."); *In re Grand Jury*, 103 F.3d 1140, 1154 (3d Cir. 1997); *In re Grand Jury Investigation*, 918 F.2d 374, 383 (3d Cir. 1990).

Although Rule 501 uses the phrase "principles of the common law," the rule directs the courts to "continue the evolutionary development of testimonial privileges" and does not freeze the law of privilege as it existed at some prior time in legal history.<sup>86</sup> Nevertheless, privileges are not recognized under Rule 501 unless the new privilege "promotes sufficiently important interests to outweigh the need for probative evidence."<sup>87</sup>

The Court has applied the above principles in Rule 501 cases to reject the adoption of new privileges against the disclosure of "legislative acts" by state legislators<sup>88</sup> and the disclosure of academic peer review.<sup>89</sup> The former privilege was rejected even though the state constitution guaranteed the privilege in state criminal proceedings. Additionally, several states recognize a statutory accountant-client privilege.<sup>90</sup> The federal courts have rejected attempts to have the accountant-client privilege recognized under Rule 501.<sup>91</sup> The creation of an accountant-client privilege was left for Congress during the 1998 session when it enacted a limited privilege for communications between clients and federally authorized tax practitioners.<sup>92</sup>

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86. *Jaffee*, 518 U.S. at 9, 116 S. Ct. at 1928.

87. *Nixon*, 418 U.S. at 711, 94 S. Ct. at 3109 (quoting *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 913 (1980)).

88. *United States v. Gillock*, 445 U.S. 360, 100 S. Ct. 1185 (1980).

89. *University of Penn. v. E.E.O.C.*, 493 U.S. 182, 189, 110 S. Ct. 577, 582 (1990). In declining to recognize a parent-child privilege under Rule 501, the *In re Grand Jury* court observed that the Supreme Court has "rarely expanded common-law testimonial privileges" into new areas. 103 F.3d at 1149. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 817, 104 S. Ct. 1495 (1984) (rejecting work product immunity for accountants); *Petersen v. Douglas County Bank & Trust Co.*, 967 F.2d 1186, 1188 (8th Cir. 1992) (rejecting insurer-insured confidentiality privilege); *United States v. Holmes*, 594 F.2d 1167, 1171 (8th Cir. 1979) (rejecting probation officer-parolee privilege); *United States v. Schoenheinz*, 548 F.2d 1389 (9th Cir. 1977) (rejecting an employer-stenographer privilege even though Oregon statute recognized privilege).

90. See Therese LeBlanc, *Accountant-Client Privilege: The Effect of the IRS Restructuring and Reform Act of 1998*, 67 UMKC L. Rev. 583, 596 (1999) (listing fourteen states as codifying the accountant-client privilege).

91. See *In re International Horizons, Inc.*, 689 F.2d 996 (11th Cir. 1982) (Under Rule 501, Bankruptcy court was not required to apply Georgia's statutory accountant-client privilege); *Falsone v. United States*, 205 F.2d 734 (5th Cir. 1953) (no accountant-client privilege to protect accountant's testimony and production of taxpayer's books from an Internal Revenue Service summons even though Florida statutory accountant-client privilege would have applied). Ironically, states' statutory accountant-client privileges were not recognized in the very cases in which they were designed to protect communications.

92. Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, § 3411, 112 Stat. 685, 750 (to be codified at 26 U.S.C. § 7525(a)(1)) ("With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney.").

In addition to recognizing a new "common law" psychotherapist-patient privilege, in *Jaffee v. Redmond*,<sup>93</sup> the Supreme Court provided a framework for analysis for determining whether a new privilege will be recognized under Rule 501.<sup>94</sup> In deciding whether a psychotherapist-patient privilege should be recognized, the *Jaffee* court first focused on the private interest served in recognizing the privilege and found it present in the imperative need for confidence and trust in the psychotherapist-patient relationship which arises because of the need for the patient to make sensitive disclosures. Because some disclosures may cause embarrassment or disgrace, the possibility of disclosure may impede the development of the necessary relationship.

The *Jaffee* court then reasoned that the privilege serves the necessary public ends because it facilitates the provision of appropriate treatment for individuals who suffer from mental or emotional problems. The evidentiary benefit from the denial of the privilege was modest since the likelihood that a party would make an admission would be diminished if the party knew the statements could be later used against the declarant.

Recognition of the psychotherapist privilege under Rule 501 was also appropriate since all states have enacted some form of a psychotherapist patient privilege. The consensus of the states in legislatively recognizing the privilege indicated to the *Jaffee* court that "reason and experience" support the privilege. Additionally, *Jaffee* reasoned that a state's promise of confidentiality would be diminished if the patient was aware that the privilege would not be recognized in federal court.

In addition, the *Jaffee* court looked to the fact that the privilege was among those nine privileges specifically recommended for adoption by the Advisory Committee for the Federal Rules of Evidence.<sup>95</sup> The court also observed the reverse proposition; i.e., that if a privilege was not one of the nine originally proposed by the Advisory Committee, it would cut against the recognition of the privilege under the federal common law.<sup>96</sup> *Jaffee* then concluded that it agreed with the state legislatures and the Advisory Committee that recognition of the privilege

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93. 518 U.S. 1, 116 S. Ct. 1923 (1996).

94. A similar analysis was used by the Third Circuit, in a pre-*Jaffee* opinion in recognizing the clergy-communicant privilege. See *In re Grand Jury Investigation*, 918 F.2d 374 (3d Cir. 1990).

95. The circuit courts of appeals have also considered the recommendations of the Advisory Committee and the Supreme Court as a useful guide in defining the federal common law of privilege under Rule 501. See *In re Grand Jury Investigation*, 918 F.2d 374, 380-81 (3d Cir. 1990) ("[T]he proposed rules provide a useful reference point and offer guidance in defining the existence and scope of evidentiary privileges in the federal courts. . . . The Standards are the culmination of three drafts prepared by an Advisory Committee consisting of judges, practicing lawyers and academicians. . . . Finally they were adopted by the Supreme Court."); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir.), cert. denied, 444 U.S. 833, 100 S. Ct. 65 (1979).

96. *Jaffee*, 518 U.S. at 14, 116 S. Ct. at 1930.



serves a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."<sup>97</sup>

Despite *Jaffee*, the federal courts have indicated a narrowing interpretation of existing privileges and a hesitation to recognize new privileges under the principles of the common law in a series of cases arising out of the investigation by the Office of Independent Counsel. When a federal grand jury subpoenaed documents created during meetings between Hillary Clinton and an attorney for the Office of Independent Counsel, the Eighth Circuit ruled that the documents were not protected by the attorney-client privilege even though the client had a reasonable belief that the conversations were privileged.<sup>98</sup>

Similarly, a new "protective function" privilege under Rule 501 with respect to information obtained by Secret Service personnel while performing their protective function in close proximity to the President was rejected by the Court of Appeals for the District of Columbia. The court reasoned in *In re Sealed Case*,<sup>99</sup> that the Supreme Court has demanded the proponent of a new privilege "come forward with a compelling empirical case for the necessity of the privilege."<sup>100</sup> Because of the novelty of the Office of Independent Counsel's demand for the testimony, the lack of federal or state precedent recognizing a protective function privilege was dismissed. The court concluded that the Secret Service had not demonstrated with compelling clarity that the failure to recognize the protective privilege would effectively jeopardize its ability to protect the President. However, the proposed protective function privilege was found not to clearly promote interests which outweighed the need for the probative evidence. Thus, the Secret Service failed under Rule 501 to carry its heavy burden to establish the need for the protective function privilege. The question of whether a protective function privilege was appropriate and, if so, "what the contours of that privilege should be" was left to Congress.<sup>101</sup>

When asked by the Office of Independent Counsel to rule that the attorney-client privilege does not survive the death of the client in criminal cases, the Court in *Swidler & Berlin v. United States*,<sup>102</sup> focused on the "great body of caselaw" supporting the recognition in cases involving the death of the client.<sup>103</sup> In rejecting the argument of Independent Counsel, the Court distinguished between recognition of privileges recognized by the common law and the interpretation of an existing

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97. *Id.* at 15, 116 S. Ct. at 1931 (quoting *Trammel v. United States*, 445 U.S. 40, 50, 100 S. Ct. 906, 912 (1980)).

98. *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 913 (8th Cir.), *cert. denied*, 521 U.S. 1105, 117 S. Ct. 2482 (1997).

99. 148 F.3d 1073 (D.C. Cir.), *cert. denied*, 119 S. Ct. 461 (1998).

100. *Id.* at 1076.

101. *Id.* at 1079. In *In re Grand Jury*, 103 F.3d 1140, 1155 (3d Cir. 1997), in refusing to recognize a parent-child privilege under Rule 501, the court commented that "we should be chary about creating new privileges and ordinarily should defer to the legislature to do so."

102. 118 S. Ct. 2081 (1998).

103. *Id.* at 2085.

privilege. The *Swidler & Berlin* opinion suggests that the principle that privileges "be strictly construed because they are inconsistent with the paramount judicial goal of truth seeking" is limited to cases involving the creation of privileges recognized by the common law. The court reasoned that since the attorney-client privilege is one of the oldest privileges and the Court is asked to interpret it in a manner which narrows it contrary to the weight of the case law, arguments against the survival of the privilege are not sufficient where they are based largely on "speculation" as to whether the termination of the privilege after death would adversely effect a client's willingness to confide in an attorney. The court observed that "[i]n an area where empirical information would be useful, it is scant and inconclusive."<sup>104</sup>

### 3. "Common Law" Mediation Privilege

#### a. Jaffee Analysis

Initially, a *Jaffee* analysis requires an examination of the private interests and the public ends that a mediation privilege would serve.<sup>105</sup> Among the private interests served by a mediation privilege is recognition that effective mediation depends on an atmosphere in which a party believes that what is disclosed to the mediator or the opposing party is confidential. Commentators argue that increased

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104. *Id.* at 2087.

105. A few pre-*Jaffee* decisions focused on whether some sort of mediation privilege should be recognized, particularly in the field of labor relations. See *NLRB v. Joseph Macaluso, Inc.*, 618 F.2d 51 (9th Cir. 1980) (Revoked subpoena from NLRB to mediator from Federal Mediation and Conciliation Service because the labor mediator's testimony would result in public perception that the mediator was biased towards labor or management and undermine the statutory labor structure designed to advance industrial peace, the interests of the parties, and the nation's economic health.); *Port Arthur v. United States*, 517 F.Supp. 987 (D. D.C. 1981), *aff'd*, 459 U.S. 159, 103 S. Ct. 530 (1982) (mediators for federal Community Relations Service could refuse to testify to any confidential information learned by mediating). *Rogers & McEwen*, *supra* note 12, at 9:11 suggests that "[t]hese cases do not indicate either that there is a trend toward creation of a generic common law mediation privilege or that the courts will generally interpret statutes creating mediation programs as requiring a common law privilege. The FMCA and CRS cases involved . . . legislative interest in encouraging settlements through mediation, not the creation of a mediator privilege without legislative guidance." See also *Shabazz v. Scurr*, 662 F. Supp. 90 (S.D. Iowa 1987); *Kientzy v. McDonnell Douglas Corp.*, 133 F.R.D. 570 (E.D. Mo. 1991), *aff'd*, 990 F.2d 1051 (8th Cir. 1993).

On the other hand, *Smith v. Smith*, 154 F.R.D. 661 (N.D. Tex. 1994) involved a grand jury subpoena to a mediator to give testimony concerning state mediation in an investigation of RICO and federal securities law violations. The district court's opinion questioned the validity of arguments that a mediator privilege was needed to create the appearance of neutrality of the mediator and to insure an adequate supply of mediators. The court also discussed, without deciding, whether a mediator's privilege would be recognized under Rule 501.

party participation and control over decisions, as well as an improved level of communication that occurs between the parties, are private interests served by the mediation process.<sup>106</sup> The possibility of disclosure may impede the development of the relationships necessary for successful mediation and result in the parties having to resolve the action through the trial process. Thus, important private interests will be served by the recognition of the privilege.

The public interest is also served by the recognition of a mediation privilege because it will help to foster the growth of mediation. As Congress has recognized, mediation may promote faster and more frequent resolution of disputes outside the courtroom by reducing the large backlog of pending cases and allowing the courts to process their remaining cases more efficiently.<sup>107</sup> ADR enables the state to provide a method of dispute resolution which has the potential to create greater satisfaction to its citizens who are more likely to be satisfied with the outcome than using the traditional litigation method.<sup>108</sup> Additionally it has been argued that mediators do not appear to be neutral if required to testify.<sup>109</sup>

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106. See Bush, *What Do We Need a Mediator For?*, *supra* note 12; Kirtley, *supra* note 12, at 10 ("A principal purpose of the mediation privilege is to provide mediation parties protection against these downside risks of a failed negotiation."); Fisher et al., *supra* note 2, at 33.

The Reporter's Notes to the Uniform Act observe that "disputant participation in the mediation process, often with counsel, allows for results that are tailored to the disputants' needs, and leads the disputants to be more satisfied with the resolution of their disputes." (July 1999 draft), available at *Uniform Mediation Act* (visited Nov. 30, 1999) <<http://www.law.upenn.edu/bll/ulc/mediat/medam99.htm>>.

107. P.L. 105-315, § 2(2), 112 Stat. 2993 (1998). For the view that there is no evidence that mediation promotes these benefits, see James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act 51-53* (1996) (referred to as the RAND Report) (suggests there is "no strong statistical evidence that the mediation or neutral evaluation programs, . . . significantly affected time to disposition, litigation costs, or attorneys views of fairness or satisfaction with case management"). Compare Craig A. McEwen & Elizabeth Plapinger, *RAND Report Points Way to Next Generation of ADR Research*, *Dispute Resolution Magazine* 10 (Summer 1997).

108. Commentators have argued that other public values are advanced by mediations. See Bush, *Mediation and Adjudication*, *supra* note 12, at 12 (Mediation makes the parties responsible for important process and outcome decisions and requires the parties to find and accept compromise solutions; "both the experience of the mediation process and the kind of results it produces serve the public value of civic education in self-determination and respect for others."). The justifications for the strong policy encouraging mediation are that the mediation "empower[s] citizens to resolve their own disputes, . . . help[s] restore and strengthen strained relationships" and serves as "a means to reform the civil justice system." Thompson, *supra* note 49, at 360-61.

109. See Kirtley, *supra* note 12, at 10 ("Another critical purpose of the privilege is to maintain the public's perception that individual mediators and the mediation process are neutral and unbiased."). This argument and the argument that there would be a shortage of mediators if mediators were required to testify was questioned in *Smith v. Smith*, 154 F.R.D. 661, 674 (N.D.Tex. 1994).

Most states have adopted some sort of a mediation privilege.<sup>110</sup> Some jurisdictions broadly apply the privilege to all mediations.<sup>111</sup> Another approach is to limit the applicability of a privilege to mediations offered by a particular institution, such as a specific publicly-funded entity and not recognize a privilege which applies to all mediations.<sup>112</sup> Others limit the privilege to court-ordered or court-annexed mediations.<sup>113</sup> If the state does not protect confidentiality with a privilege, it is protected by Rule 408 or a similar common law rule protecting settlement negotiations.<sup>114</sup> As contrasted with the psychotherapist privilege, there is more variance in the protections adopted by the states and not as strong a consensus expressing a consistent policy determination from which it can be reasoned that "reason" and "experience" support the recognition of a broad mediation privilege. An additional factor not present in *Jaffee* is the lack of consensus of the district courts in protecting the confidentiality of court-based mediation though their local rules. However, it is unclear from reading *Jaffee* the

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110. Rogers & McEwen, *supra* note 12, at Appendices A and B contains a list of the states adopting some sort of mediation privilege. See Assey, *supra* note 17, at 995.

111. Colo. Rev. Stat. § 13-22-307(2) (1998) ("Any party or the mediator or mediation organization in a mediation service proceeding or a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any information concerning any mediation communication or any communication provided in confidence to the mediator or a mediation organization, . . ."); Mo. Rev. Stat. § 435.014(2) (1992) ("No admission, representation, statement or other confidential communication made in setting up or conducting such [mediation] proceedings not otherwise discoverable or obtainable shall be admissible as evidence or subject to discovery"); Okla. Stat. Ann. Tit. 12 § 1805 (West 1998) ("Any information received by a mediator or a person employed to assist a mediator, through files, reports, interviews, memoranda, case summaries, or notes and work products of the mediator, is privileged and confidential."); Tex. Civ. Prac. & Rem. Code § 154.073(a) (1997) ("Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding."); Wash. Rev. Code § 7.75.050 (1992) ("Any communication relating to the subject matter of the resolution made during the [alternative dispute] resolution process by any participant, mediator, or any other person is a privileged communication and is not subject to disclosure in any judicial or administrative proceeding. . ."); Wis. Stat. Ann. § 904.085(3) (West 1998) ("Except as provided under sub. (4), no oral or written communication relating to a dispute in mediation made or presented in mediation by the mediator or a party is admissible in evidence or subject to discovery or compulsory process in any judicial or administrative proceeding.").

112. Ariz. Rev. Stat. Ann. § 25-381.16 (West 1998) (domestic violence centers); Minn. Stat. Ann. § 176.351 (West 1998) (workers compensation bureau); N.Y. Lab. Law § 717 (McKinney 1998) (department of labor's state mediation board).

113. Fla. Stat. ch. 44.102(3) (1997). See also M.D. Fla. R. 9.07.

114. Mississippi does not have a mediation privilege, but it has a confidentiality provision in the standing order authorizing a pilot mediation program, Miss. Order 98-9 (Pilot Mediation Program), § 7, and has the protection of Miss. R. Evid. 408. Vermont does not have a mediation privilege, but protects for statements made during mediation by specifically including mediation within Vt. R. Evid. 408.

significance of the apparent lack of agreement concerning a broad privilege.<sup>115</sup> If the mediation privilege provision presently included in the Proposed Uniform Mediation Act is widely adopted by the states, this factor used to determine whether to recognize a "common law" privilege will more clearly be present.<sup>116</sup>

Cutting against the recognition of mediation privilege is the failure of the Advisory Committee to include a mediation privilege in the nine evidentiary privileges it recommended.<sup>117</sup> The only "common law" privilege generally recognized in the federal courts which was not included in the Advisory Committee's proposals is the marital confidential communication privilege.<sup>118</sup> If the failure of the Advisory Committee to recommend a mediation privilege is the only *Jaffee* factor not present, recognition of the new privilege would probably not be defeated

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115. *Jaffee v. Redmond*, 518 U.S. 1, 14 n.13, 116 S. Ct. 1923, 1937 n.13 (1996) (The divergence among the states concerning the matters protected by the privilege was not deemed significant in light of the state's unanimous judgement that "some form of psychotherapist privilege is appropriate."). In *In re Grand Jury Investigation*, 918 F.2d 374, 381 (3d Cir. 1990), the court, in recognizing a clergy privilege, said that "virtually every state has recognized some form of clergy-communicant privilege." Differences in the form or the types of proceedings protected by state mediation privileges may not be significant to the issue of whether a mediation privilege should be recognized under Rule 501.

116. The American Bar Association Section of Dispute Resolution and the National Conference of Commissioners on Uniform State Laws are in the initial stages of drafting a Uniform Mediation Act. The first issue the drafters focused on was confidentiality. See Richard Rueben and Nancy H. Rogers, *Movement Toward A Uniform Confidentiality Privilege Faces Cross-currents*, Dispute Resolution Magazine 4 (Winter 1998). Uniform Mediation Act § 2 provides: "(a) A disputant may refuse to disclose, and prevent any other person from disclosing, mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. . . . (b) A mediator may refuse to disclose, and prevent any other person from disclosing, the Mediator's mediation communications and may refuse to provide evidence of mediation communications in a civil, juvenile, criminal misdemeanor, arbitration, or administrative proceeding. . . ." (July 1999 Draft), available at *Uniform Mediation Act* (visited Nov. 30, 1999) <<http://www.law.upenn.edu/bll/ulc/mediat/medam99.htm>>.

117. See *In re Grand Jury*, 103 F.3d 1140, 1151 (3d Cir. 1997), *cert. denied*, 117 S. Ct. 2412 (1997) (In refusing to recognize a parent-child privilege under Rule 501 the court said: "[T]he parent child privilege . . . was not among the enumerated privileges submitted by the Advisory Committee. Although this fact, in and of itself, is not dispositive with respect to the question as to whether this court should create a privilege, it strongly suggests that the Advisory Committee, . . . did not regard confidential parent-child communications sufficiently important to warrant 'privilege' protection."). The privilege rules included in the Revised Draft of Proposed Rules of Evidence for United States Courts and Magistrates are reported at 51 F.R.D. 315, 356-83.

118. The Advisory Committee did include a privilege for the accused spouse to assert a privilege to prevent a witness spouse from testifying. In *Trammel v. United States*, 445 U.S. 40, 100 S. Ct. 906 (1980), the Court held that a testifying spouse has the sole right to claim a marital privilege to avoid testifying against an accused-spouse, rather than the proposed rule which gave the accused-spouse the right to bar a spouse's testimony. *Trammel* recognized the continued vitality of the marital communications privilege in the federal courts. 445 U.S. at 46, 100 S. Ct. at 911.

since the Advisory Committee's recommendations were made in 1972, before mediation became widely accepted.<sup>119</sup>

In weighing whether an evidentiary privilege should be recognized, the courts will consider whether the protection of the privilege is worth the cost. The loss of information to society and the justice system is the most obvious cost. A mediation privilege differs in at least one significant aspect to most other "common law" privileges. In the latter, only the professional and the protected party have knowledge of the contents of the privileged communication. In the case of the mediation privilege, knowledge of the communications in the joint session is possessed by the opposing party. If the mediation fails, the parties proceed to trial, and the mediation privilege prohibits the introduction of relevant evidence, the party who sought unsuccessfully to admit the evidence may be aware of its contents. If the party perceives that mediation and an accompanying privilege lead to an unjust trial or outcome, the public acceptance of mediation may be undermined.<sup>120</sup> So too, if a mediation privilege excludes evidence of an offer to settle a personal injury action made by an insurance carrier during a mediation in a subsequent action against the carrier for the bad faith failure to settle the claim, a strong argument could be made that the concepts of truth and justice would be denied. The recognition of a common law privilege will require the careful consideration of exceptions in order to insure that the protection is worth the cost.<sup>121</sup>

An important issue is whether the analysis used to recognize a common law mediation privilege under Rule 501 differs because of the presence of Rule 408, which generally protects against the admission of statements made during settlement negotiations.<sup>122</sup> No other confidential communication protected under Rule 501 is also protected by an exclusionary rule of evidence. Rule 408 does not

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119. See Dana Shaw, *Mediation Certification: An Analysis of the Aspects of Mediator Certification and an Outlook on the Trend of Formulating Qualifications for Mediators*, 29 *Tol. L. Rev.* 327, 329 (1998) (discussing the evolution of mediation).

120. See Green, *supra* note 17, at 10. Although Professor Green makes a similar argument against a blanket confidentiality privilege, the concern is greatest if statements made during the joint mediation sessions in the presence of the opposing party are completely shielded from the judge and jury by a privilege. A party is not aware of statements made by the opponent during a private caucus between the opponent and her attorney.

121. Section 2(c) of the Uniform Mediation Act (July 1999 Draft), available at *Uniform Mediation Act* (visited Nov. 30, 1999) <<http://www.law.upenn.edu/bll/ulc/mediat/medam99.htm>>, provides nine exceptions to the privilege, including the record of agreement, evidence of abuse, reports of professional misconduct, complaints against the mediator, threats of bodily harm or property damage and use of the process to commit a crime.

122. A privilege offers greater protection of confidentiality than does Rule 408. See Kirtley, *supra* note 12, at 11-12. If a mediation privilege is applicable, a party in another proceeding cannot use the discovery process to invade the mediation. A mediation privilege would prohibit the use of statements made during mediation and offered during trial to attack credibility, while Rule 408 may not. See *supra* notes 53-55 and accompanying text.

go as far in extending the cloak of confidentiality as does a mediation privilege. For example, a privilege shields the mediation process from discovery and does not permit privileged matter to be used to impeach the credibility of a witness.<sup>123</sup> For years, parties have negotiated settlements outside of the mediation or ADR process with only the protection of Rule 408 and without the protection of an evidentiary privilege. Rule 408 promotes many of the interests that would be served by a mediation privilege.<sup>124</sup> Obviously there is greater protection of confidentiality with a mediation privilege than without. However, a clear articulation of what is special about mediation requiring a broad protection of communications with a privilege rather than only applying the Rule 408 exclusion is necessary.<sup>125</sup> In both *Swidler & Berlin*<sup>126</sup> and *In re Sealed Case*,<sup>127</sup> the courts emphasized the need for empirical evidence to support the recognition of a new privilege or to restrict the application of an existing one. In light of these recent decisions, the most persuasive argument to recognize a mediation privilege under Rule 501 would be based on empirical data that demonstrates that the values of mediation are enhanced in jurisdictions which have a broad mediation privilege as contrasted with those which simply protect confidentiality with Rule 408.<sup>128</sup> For example, research which demonstrates that substantially more cases are resolved prior to trial in states that have a mediation privilege or that its citizens have greater satisfaction in the process when a privilege is applicable than in states that only use the Rule 408 protection.<sup>129</sup> If this data is presented, the public interest served by the privilege more clearly appears. If the mediation process cannot be shown to be enhanced by the presence of the privilege, the most recent federal cases indicate that it is unlikely the

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123. See *Jaffee v. Redmond*, 518 U.S. 1, 23, 116 S. Ct. 1923, 1935 (1996) (Scalia, J., dissenting) (arguing that psychotherapist-patient privilege should not be recognized under Rule 501, in part because it would permit a defendant "to deny her guilt in the criminal trial—or in a civil trial for negligence—while yet obtaining the benefits of psychotherapy by confessing guilt to a social worker who cannot testify").

124. See *Green*, *supra* note 17, at 1 (arguing that blanket mediation privileges are unnecessary, unjustified and counterproductive and that adequate protection exists under current law).

125. *Rogers & McEwen*, *supra* note 12, at § 9.02 ("Implicit in the policy debate about broadened confidentiality for mediation is the assumption that there is something special about mediation that warrants a broader exclusion than is provided for compromise discussions without a mediator. Rarely is the basis for the assumption articulated. . .").

126. *Swidler & Berlin v. United States*, 524 U.S. 399, 118 S. Ct. 2081 (1998).

127. 148 F.3d 1073 (D.C. Cir. 1998).

128. *Green*, *supra* note 17, at 31-2, suggests that there is no data that supports the proposition that a blanket mediation privilege assuring confidentiality is essential to the mediation process.

129. *Green*, *supra* note 17, at 33-35, suggests there is no empirical research. Scott H. Hughes, *Confidentiality in Mediation: A Closer Look*, *Dispute Resolution Magazine* 14 (Winter 1998) ("almost no" empirical data exists to support the need for a mediation privilege). See generally, James S. Kakalik et al., *An Evaluation of Mediation and Early Neutral Evaluation under the Civil Justice Reform Act* 51, 53 (1996) ("sound empirical research on various ADR mechanisms is quite thin").

privilege will be recognized under Rule 501. The federal courts would then defer to Congress to decide if a mediation privilege should be recognized, and if so, in what form.<sup>130</sup>

*b. Parameters*

The parameters of the privilege will not immediately be delineated. Rather, as in *Jaffee and Upjohn Co. v. United States*,<sup>131</sup> the Supreme Court will leave the refinement of the privilege to occur in the lower federal courts on a case-by-case basis.<sup>132</sup> In recognizing the application of a psychotherapist-patient privilege and an attorney-client privilege in the corporate context, the Court declined to go beyond holding that the privilege was present under the facts of each case and stated that the details of the privilege should be developed on a case-by-case basis.<sup>133</sup> Therefore, it is unlikely that the federal courts will soon supply answers to many questions, such as whether a privilege extends to statements during premediation, to statements during the caucus and/or the joint session and to demeanor or conduct, as well as the issue of waiver. However, the contours of the privilege would be influenced by the judgments made by the states who recognize the mediation privilege.<sup>134</sup>

*c. Qualified or Absolute*

A "common law" mediation privilege under Rule 501 should not be a qualified privilege, in that its protection should not depend on the court's balancing the need for the disclosure against interest in confidentiality to determine whether the privilege is applicable. Making confidentiality contingent upon a judge's

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130. In re Grand Jury, 103 F.3d 1140, 1154 (3d Cir. 1997), *cert. denied*, 117 S. Ct. 2412 (1997) ("The legislature, not the judiciary, is institutionally better equipped to perform the balancing of the competing policy issues required in deciding whether the recognition of a parent-child privilege is in the best interests of society. Congress, through its legislative mechanisms, is also better suited for the task of defining the scope of any prospective privilege.").

131. 449 U.S. 383, 101 S. Ct. 677 (1981) (recognizing attorney-client privilege in corporate context).

132. In re Grand Jury Investigation, 918 F.2d 374, 385 (3d Cir. 1990) (Recognizing clergy privilege under Rule 501 but declining to address who can assert the privilege. "The precise scope of the privilege and its additional facets . . . are . . . most suitably left to case-by-case evolution.").

133. In *Swidler & Berlin v. United States*, 524 U.S. 399, 407-09 118 S. Ct. 2081, 2086-87 (1998), the Court noted in the case of the attorney-client privilege that an uncertain privilege is often better than no privilege at all.

134. See *Jaffee v. Redmond*, 518 U.S. 1, 15, 116 S. Ct. 1923, 1938 (1996) (noting that a majority of states extend a testimonial privilege to licensed social workers in determining that the Rule 501 psychotherapist-patient privilege should be extended to "confidential communications made to licensed social workers in the course of psychotherapy").



subsequent evaluation of the relative importance of the competing interests "would eviscerate the effectiveness of the privilege."<sup>135</sup> The Court previously has rejected arguments that the attorney-client<sup>136</sup> and psychotherapist-patient<sup>137</sup> privilege should be qualified rather than absolute. To serve the purposes of these privileges, the Court has reasoned that the participants in the conversations must be able to predict with some certainty whether discussions will be protected. The application of a balancing of interests to determine whether a privilege is present would negate the purpose and effectiveness of a mediation privilege.<sup>138</sup>

#### *d. Exceptions*

Recognition of a Rule 501 privilege involves a weighing of competing interests and social values. Even if there are sufficient interests in confidentiality to recognize a privilege in most cases, there may be specific situations in which a different social policy may outweigh the general need for the privilege.<sup>139</sup> A privilege should not be misused with the result that significant evidence is lost while the purposes of the privilege are not promoted. Courts and evidence codifications attempt to solve this problem by providing that an "exception" to a privilege is present. For example, in the case of the attorney-client privilege, when the client seeks the attorney's services with respect to ongoing or future crime or fraud, the privilege is not recognized.<sup>140</sup> Clients are not entitled to use lawyers to assist them in pursuing unlawful or fraudulent objectives. If the privilege protected such communications, public confidence in the system and the profession would be lost. Similarly, while the *Jaffee* court recognized a new psychotherapist privilege, it also observed that "there are situations in which the [psychotherapist-

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135. *Id.* at 17.

136. *Upjohn Co. v. United States*, 449 U.S. 383, 399, 101 S. Ct. 677, 686 (1981). *See Swidler and Berlin v. United States*, 118 S. Ct. 2081 (1998) (rejecting court of appeal's decision that whether the attorney-client privilege should be recognized in criminal proceedings after the death of the client is subject to a thorough case-by-case balancing of interests); *In re Sealed Case*, 124 F.3d 230 (D.C. Cir. 1997).

137. *Jaffee*, 518 U.S. at 9, 116 S. Ct. at 1932.

138. This policy choice was rejected by Congress when it adopted 5 U.S.C. § 574 (a)(4) (1997) which provides that the statutory mediation privilege for dispute resolution in the federal administrative process does not attach to a communication if a court determines that the testimony or disclosure is necessary to prevent a manifest injustice.

139. *Clark v. United States*, 289 U.S. 1, 13, 53 S. Ct. 465, 469 (1933) ("[T]he recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a Court to mediate between them. . .").

140. *See United States v. Zolin*, 491 U.S. 554, 562-63, 109 S. Ct. 2619, 2629-31 (1989) (discussing the crime-fraud exception to the attorney-client privilege).

An exception to the privilege is also recognized when the heirs of a deceased client are claiming against the estate in a dispute over the decedent's will. *See Swindler & Berlin*, 524 U.S. at 405, 118 S. Ct. at 2085. Proposed Federal Rule 502 recognized five exceptions to the attorney-client privilege.

patient] privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist."<sup>141</sup> A balancing of interests recognizes that the safety of the threatened person outweighs the generalized need for the privilege.

Just as they use a restrained approach to define the parameters of Rule 501 privileges, federal courts are reluctant to spell out the exceptions to recognized privileges in detail; rather, they are developed when appropriate cases arise. The principles of comity will not provide significant assistance to the federal courts since state statutory privileges vary widely; some recognize no express exceptions,<sup>142</sup> while others recognize a variety of them.<sup>143</sup> Among the situations that may lead to recognition of exceptions to a "common law" mediation privilege are when a party to the mediation makes a serious threat to the safety of another.<sup>144</sup> As with the psychotherapist-patient privilege, the interest in the safety of the citizens may outweigh the need for the privilege. Both the lawyers representing the parties to mediation as well as the mediators may be liable for certain inappropriate actions which occur during the mediation. The party instituting such an action should not be able to assert the privilege to bar the defendant from testifying; nor should the defendant be able to assert the privilege to bar the plaintiff from proving the misconduct.<sup>145</sup>

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141. *Jaffee*, 518 U.S. at 18 n.19, 116 S. Ct. at 1936 n.19. See *United States v. Glass*, 133 F.3d 1356 (10th Cir. 1998) (Applying psychotherapist-patient privilege in criminal case to statements made by defendant during counseling session with psychotherapist but remanding for trial court to determine if the defendant's threat of harm to the President was serious and if it could be averted only by disclosure, in which case the privilege would not protect the communication.). Proposed Federal Rule of Evidence 504 contained three exceptions to the psychotherapist privilege.

142. Fla. Stat. ch. 90.501 (1997); N.C. Gen. Stat. § 8C-501 (1997).

143. Tenn. Code Ann. § 37-1-614 (1998) (evidentiary privileges inapplicable in child abuse cases); V.I. Code Ann. Tit. 5, § 856 (1998) (exceptions to marital privilege); Ala. R. Evid. 504(d) (exceptions to marital privilege).

144. Uniform Mediation Act § 2(c)(2) (July 1999 Draft), available at *Uniform Mediation Act* (visited Nov. 30, 1999) <<http://www.law.upenn.edu/bll/ulc/mediat/medam99.htm>>.

145. See Lynn A. Epstein, *Post-Settlement Malpractice: Undoing the Done Deal*, 46 Cath. U. L. Rev. 453 (1997) (suggested that in every state but one a client is permitted to proceed with the action based on the theory that the client's lawyer negligently negotiated an agreement despite the fact that the client consented to the agreement).

Similarly, if the mediator observes misconduct of the attorneys or the attorneys observe misconduct of the mediator, a strong argument exists that the privilege should not extend to prohibit testimony concerning misconduct. If an ethics complaint is filed against an attorney or the mediator arising out of the mediation, a mediation privilege should not prohibit the attorney or mediator from testifying to what occurred during the mediation. See Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict For Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and The Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. Rev. 715.

Although mediators generally are immune from suit for their actions during the mediation proceeding, the decisions assume there are situations in which immunity will not be recognized. See, e.g., *Postma v. First Fed. Sav. and Loan*, 74 F.3d 160, 162 (8th Cir. 1996)

Exceptions are recognized in the limited statutory mediation privilege enacted by Congress in federal administrative proceedings<sup>146</sup> as well as in the current draft of the Uniform Mediation Act. Exceptions to both the Rule 501 "common law" attorney-client and psychotherapist patient privileges are well recognized and accepted. These privileges protect interests which are at least as important as those protected by a "common law" mediation privilege. Just as exceptions are recognized in limited situations to the attorney-client and psychotherapist-patient privileges, exceptions should be recognized to a mediation privilege when social policy outweighs the need for the privilege.<sup>147</sup>

## VI. CONCLUSION

Both the increased use of mediation and the adoption of the ADR Act of 1988 will inevitably lead to a corresponding need for federal courts to more clearly define the extent of the protection extended to the confidentiality of mediation proceedings. The extent of protection may be clear under state law, which is applicable under Federal Rule 501 when state substantive law supplies the rule of decision. However, in federal criminal cases and in civil cases where federal law supplies the rule of decision, an analysis of the relevant interests is necessary to determine the protection afforded confidentiality. In this latter situation, when failed mediations subsequently result in federal jury trials, or state-court mediations are the subject of discovery or introduction during a federal trial or proceeding, local rules of court, Rule 408 and a "common law" mediation privilege provide different protections for confidentiality.

The most well-defined protection is Rule 408 which applies to all mediation proceedings, as it does to other compromise or settlement discussions. Many argue that the extent of the protection provided to the confidentiality of mediation by Rule 408 is insufficient.<sup>148</sup> The perceived problem is that the rule only deals with

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(Iowa law immune from suit unless mediator acted "in bad faith, with malicious purpose, or in a manner exhibiting willful and wanton disregard of human rights, safety or property"); *Wagshal v. Foster*, 28 F.3d 1249, 1252 (D.C. Cir. 1994) (immunity so long as mediator's actions "were taken within the scope of his duties. . ."); *Mills v. Killebrew*, 765 F.2d 69 (6th Cir. 1985) (mediator was entitled to immunity unless mediator acted in "the clear absence of all jurisdiction").

146. 5 U.S.C.A. § 574 (4) (1997) provides that the confidentiality of the mediation proceeding will not be maintained if a court determines that the disclosure is necessary to help establish a violation of law or to prevent harm to the public health or safety.

147. If a motion or hearing raises a material issue of the conduct of the parties during the mediation, such as requesting Rule 11 sanctions, the privilege will probably not be a shield for otherwise sanctionable conduct. *Doe v. Nebraska*, 971 F. Supp. 1305 (D. Neb. 1997) (Although statements made during mediation proceedings shall "not be admissible in evidence for any reason in the trial of the case," the rule would not bar evidence of statements made during mediation proceeding in an adversary hearing concerning a motion for sanctions arising from a failed mediation session.).

148. See Assey, *supra* note 17; Jonathan Hyman, *The Model Mediator Confidentiality*

the inadmissibility of evidence at trial when the evidence is offered to prove the liability for the underlying claim. If the evidence is offered for another material purpose, such as showing bias or perhaps as a prior inconsistent statement, the evidence of the mediation proceeding may not be excluded.<sup>149</sup> Similarly, it is argued it does not provide sufficient protection for confidentiality since it does not prevent otherwise appropriate discovery of the mediation proceeding.<sup>150</sup> On the other hand, for years parties have successfully negotiated settlements and compromised matters outside of the mediation or ADR process with only the protection of Rule 408 and its common law ancestors. There has been no outcry that a greater protection for confidentiality is necessary to enable the parties to successfully negotiate settlements.

The breadth of two other sources of protection for confidentiality in federal courts is uncertain. Local rules adopted by many district courts recognize that mediation and other forms of court-based ADR are confidential. However, the rules are inconsistent, poorly drafted and sometimes confusing. Moreover, there is no consensus among the districts as to the extent of the protection.

The local rules, in fact, may serve as a trap for the unwary practitioner from outside the district who mediates in a court-based program. Counsel may assume that the foreign district's rule relating to confidentiality is the same as the district in which counsel normally practices. As Part III of this paper demonstrates, such an assumption is misguided. Moreover, it is not good policy to have significant variance in the provisions of local rules dealing with the issue of confidentiality. Even if a local rule clearly states the extent of the protection given confidentiality of mediation, the protection is limited to federal district-court based ADR programs. Usually, mediations which occur in state court or voluntary, pre-suit mediations are not protected.

The broadest protection for the confidentiality of mediation would be present if a testimonial or evidentiary mediation privilege is recognized in federal courts. Since there is no statutory general federal mediation privilege, a *Jaffee* analysis must be employed to determine whether a "common law" privilege will be recognized under Rule 501. Significant private and public interests will be served by recognition of a "common law" mediation privilege. However, it is not clear that there is a consensus that a mediation privilege should be recognized under the principles of the common law as interpreted in light of reason and experience. While it can be argued that most states have enacted a mediation privilege in some form, the wide diversity of protection in the district court local rules indicates that there is no consensus in the federal district courts themselves. The wide-spread

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*Rule: A Commentary*, 12 Seton Hall Legis. J. 17 (1988); Kirtley, *supra* note 12.

149. Green, *supra* note 17, at 35, argues that the adoption of a mediation privilege is a "bad idea" and that the protection of Rule 408 provided to the confidentiality of mediation is sufficient if Rule 408 clearly excludes evidence of the compromise negotiations which are offered for impeachment.

150. Kirtley, *supra*, note 12, at 13.

adoption by the states of a mediation privilege in the Uniform Mediation Act now being drafted would bolster the argument that a consensus was present.

Recently, federal courts have indicated a preference for empirical evidence to support the recognition of a new "common law" privilege. According to these cases, the strongest argument to recognize a new Rule 501 privilege is based on data showing that the interests underlying the privilege are enhanced by the privilege. In other words, the values that mediation advances are better served in those jurisdictions that have a mediation privilege than in those that only have confidentiality protected with Rule 408. Those favoring a privilege would be well-served to develop relevant data.

With the enactment of the 1998 Act, the use of mediation in federal courts will substantially increase. The need to resolve the extent of the protection of confidentiality of statements made during mediation will similarly become more important. Rule 408 clearly protects the confidentiality of mediation proceedings. The extent of protection afforded a court-based program is uncertain. Whether a "common law" mediation privilege will be recognized after applying the *Jaffee* factors is unclear primarily because of the lack of a strong consensus among the states and district courts regarding the privilege and the lack of data to support the need for the privilege. Particularly in light of the recent decisions arising out of the Office of Independent Counsel, it appears unlikely that the federal courts will soon recognize a Rule 501 "common law" privilege. In the near future, the uncertainty surrounding the extent of the protection granted to the confidentiality of mediation proceedings in federal courts will continue unless Congress acts to statutorily define the protection as it recently did for communications to tax preparers and for communications made during dispute resolution in the federal administrative process.